THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

COMMITTEE REPORT: IMPROPER GRAND JURY DISCLOSURES TO THE PRESS

By the Committee on Criminal Law

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I. Introduction

This report has its origin in a recent spate of highly-publicized disclosures concerning grand jury investigations. These press reports have caused some observers to assert that grand jury leaks have increased in recent years. See generally S. Gillers, "The Prosecution and Defense Functions: Do They Promote Justice?: A Report on the Sixth Annual Retreat of the Council on Criminal Justice," at 43.[1/] Further, some members of the press, bar and judiciary have attributed these disclosures to increased violations of grand jury secrecy rules by prosecutors and other government officials.

For example, on February 24, 1986, New York Times columnist William Safire accused a United States Attorney of "outrageous" conduct in allegedly leaking threats to indict a recalcitrant witness "from his safe position in ambush". W. Safire, "Essay: Guarding the Guardians: The Latest Form of Third Degree", New York Times, February 24, 1986 at A-15, col. 5.

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1. Reprinted from Vol. 42, No. 5 of the Record of the Association of the Bar of the City of New York. (hereinafter "Criminal Justice Council Report").

On February 23, 1987, a judge in the Eastern District of New York decried "what seems to be the growing practice among prosecutors" of leaking grand jury information to the press. In re Grand Jury Investigation (Esposito), No. CV-87-0163, slip op. at 16 (E.D.N.Y. Feb. 23, 1987).

In an October 12, 1987 "Op-Ed" article in the New York Times, Professor Alan M. Dershowitz wrote:

> A significant number of prominent criminal cases have recently been characterized by a troubling breakdown in confidentiality. Simply put, prosecutors and their agents have selectively leaked in the media damaging information about subjects of grand jury investigations.

A. Dershowitz, "When Prosecutors Violate Confidentiality: Questions for Giuliani and Others," New York Times, October 12, 1987 at A19, col. 2.

We are unable to conclude, however, that publicly-available information supports public commentators' claims that (1) there has been an increase in grand jury leaks and (2) prosecutors are, in the main, the source of those leaks.

At the same time, we are not convinced that all appropriate steps are being taken to punish and deter improper grand jury disclosures to the press. Disclosure of a grand jury investigation can be devastating to the reputation of an individual who has not been and may never be charged with a crime. As Staten Island District Attorney

William L. Murphy wrote in response to a questionnaire from this Committee,

> reputations are such fragile things that the simple fact of an investigation, to say nothing of the particulars being investigated, can be as destructive as an indictment itself.

(Letter of Hon. William L. Murphy, Richmond County District Attorney, March 24, 1987). It is obvious, then, that the continuing problem of grand jury leaks to the press is an important one and worthy of review by this Committee.

The Committee has therefore undertaken to analyze the publicly-available information regarding the role of all four significant participants in this problem: Grand Jury witnesses and their counsel, investigators, prosecutors[2/] and the press. On the one hand, we conclude that prosecutors are not the exclusive source of grand jury disclosures, which often emanate from witnesses, targets and investigators and that, on some occasions, when it publishes grand jury secrets obtained from unnamed official sources, the press -- rather than exposing the abuse of governmental power -- may itself become a tool of such governmental abuse.

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2. Article XIV of the By-Laws of the Association of the Bar of the City of New York authorizes this Committee "[t]o investigate and report to the Association . . . on the conduct of any public official . . ."

But, on the other hand, we also conclude that prosecutors and the government have too often permitted illegal grand jury disclosures to go uninvestigated and unpunished and have not undertaken sufficient precautionary and corrective measures to prevent such leaks. We also conclude that the courts have not demanded from the government sufficiently vigorous investigation of alleged leaks.

To substantiate these conclusions, this Report will provide a summary of the relevant law, a review of the modern history of grand jury leaks in this City and an analysis of what this history suggests. We will then describe in more detail our conclusions and recommendations, including our proposals for tighter controls on the dissemination of grand jury materials, more independent investigation of grand jury leaks, more public disclosure of the details and results of such investigations and greater judicial scrutiny of such investigations.

II. Relevant Legal Standards

As the institution charged by the Fifth Amendment with determining whether prosecution is warranted, the grand jury exercises extraordinary power over the lives of the people it investigates. The notion that grand jury proceedings and records should be shielded from the public

has its origin in seventeenth-century English common law and was intended to protect against the over-zealous use of that power by the government. Specifically, grand jury secrecy exists, in part, for "the protection of the innocent accused from disclosure of the accusations made against him before the grand jury." Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 218 n.8 (1979). Consequently, grand jury secrecy became such an "integral part of our criminal justice system" that the Supreme Court "consistently ha[s] recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings." Id. at 218.

A. Federal Standards

Rule 6(e)(2) of the Federal Rules of Criminal Procedure codifies the traditional requirement that matters occurring before the grand jury be kept confidential:

> General Rule of Secrecy. [Among other persons,] an attorney for the government [and investigators with access to grand jury matters], . . . shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

It is important to note that Rule 6(e) does not purport to limit a witness' right to disclose his own testimony before a grand jury.

The phrase "occurring before the grand jury" has been given substantial judicial gloss. Not only does the secrecy rule include actual grand jury testimony, but it encompasses information that may tend to reveal what transpired before the grand jury, such as the identities of witnesses and jurors, the substance of testimony, the strategy or direction of the investigation and the deliberations or questions of jurors. See Fund for Constitutional Government v. National Archives and Records Service, 656 F.2d 856 (D.C. Cir. 1981). Statements or memoranda describing the nature of the evidence adduced before the grand jury have also been found non-disclosable. United States v. Hughes, 429 F.2d 1293, 1294 (10th Cir. 1970). Additionally, federal secrecy provisions have been held to apply to disclosures of future events, "such as . . . [a] report [of] when the grand jury will return an indictment." In re Grand Jury Investigation (Lance), 610 F.2d 202, 217 (5th Cir. 1980).

B. New York Standards

New York State Law provides that "[g]rand jury proceedings are secret, and no grand juror [, prosecutor, public officer or public employee] may, except in the lawful discharge of his duties or upon written order of the court, disclose the nature or substance of any grand jury testimony,

evidence, or any decision, result or other matter attending a grand jury proceedings." N.Y. Crim. Proc. L. § 190.25(4). A person is guilty of a class E felony when,

> being a . . . public prosecutor, . . . or a public officer or public employee he intentionally discloses to another the nature or substance of any grand jury testimony, or any decision, result or other matter attending a grand jury proceeding which is required by law to be kept secret, except in the proper discharge of his official duties or upon written order of the court. Nothing contained herein shall prohibit a witness from disclosing his own testimony.

N.Y. Penal Law § 215.70. As is the case under federal law, a state grand jury witness is free to disclose his own testimony.

C. Remedies and Sanctions

Under federal law, a party who has been injured by the unlawful disclosure of grand jury materials may apply for various forms of relief. However, whether or not a court will grant even a hearing on matters involving grand jury secrecy is a matter of judicial discretion, see Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 398-99 (1959). Courts are unlikely to issue an order for a hearing where the alleged violation did not cause prejudice or was mooted by the return of an indictment.

The Fifth Circuit, in In re Grand Jury Investigation (Lance), supra formulated detailed standards to govern

alleged Rule 6(e) violations. This test has been generally followed in the Second Circuit. E.g., United States v. Myers, 510 F. Supp. 323 (E.D.N.Y. 1980).

Lance devised a five-part test:

> First, there must be a clear indication that the media reports disclose information about "matters occurring before the grand jury;"
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> Secondly, the article or articles must indicate the source of the information to be one of those proscribed by Rule 6(e);
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> Third, in determining whether to order a hearing, a "court must assume that all statements in the news reports are correct";
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> Fourth, a court must consider the nature of the relief requested and the extent to which it interferes with the grand jury process. A criminal defendant who seeks to obtain dismissal of an indictment, a person subpoenaed to testify before the grand jury who requests the court to quash the subpoena, or the target of an ongoing grand jury investigation who seeks to have the grand jury dismissed bears a heavy burden in attempting to justify such relief. A prima facie case to secure a hearing on whether to impose contempt sanctions upon government attorneys, however, does not require as strong a showing . . .;
>
> Fifth, the court must weigh any evidence presented by the government to rebut the assumed truthfulness of reports which otherwise make a prima facie case of misconduct.

610 F.2d at 216-20.

Once a prima facie case has been established, the court has the discretion to consider a number of options, including an evidentiary hearing, ordering an internal investigation by the government, and even appointment of a

special prosecutor. See U.S. v. Eisenberg, 711 F.2d 959, 968 (11th Cir. 1983); In re Grand Jury Investigation (Esposito), No. CV-87-0163, slip op. at 17 (E.D.N.Y. 1987); Matter of Archuleta, 432 F. Supp. 583, 599 (S.D.N.Y. 1977). As a practical matter, however, courts usually do little more than require an internal investigation and a report to the court.

While New York state courts have established standards for the authorized disclosure of grand jury information pursuant to N.Y. Crim. Proc. L. § 190.25(4), e.g., Matter of Dist. Atty. of Suffolk County, 58 N.Y.2d 436, 461 N.Y.S.2d 773 (Ct. App. 1983), we have been unable to find a single state court decision discussing an incident of unlawful disclosure of secret grand jury materials.

III. The Committee's Survey

In addition to reviewing publicly-available information and consulting with defense lawyers, the Committee mailed a questionnaire to state and federal prosecutors in New York City.[3/] We asked each prosecutor

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3. The recipients of this questionnaire were: Rudolph W. Giuliani, United States Attorney for the Southern District of New York, Andrew J. Maloney, United States Attorney for the Eastern District of New York, Elizabeth Holtzman, District Attorney of Kings County, Charles J. Hynes, Special State Prosecutor for the New York City Criminal Justice System, Mario Merola, then District Attorney of Bronx County, Robert M.

(footnote continues)

for:

1. Information concerning the incidence, nature and scope of unauthorized grand jury disclosures.

2. A description of each office's policy regarding the investigation of grand jury leaks.

3. The scope, techniques and results of any investigation of grand jury disclosures.

4. Information whether, as a matter of policy, the prosecutor's office reacts by way of public comments to publicized reports of grand jury matters.

5. A description of any litigation by victims of alleged grand jury disclosures.

6. Prosecutors' views concerning appropriate remedies and sanctions.

While some of the responses we received were helpful, few prosecutors answered most of our specific inquiries. The prosecutors' answers were nevertheless instructive in several respects. First, despite our request, not one prosecutor's office could identify past instances of unauthorized grand jury disclosures to the press.[4/]

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3. (footnote continued)

Morgenthau, District Attorney of New York County, William L. Murphy, District Attorney of Richmond County, and John J. Santucci, District Attorney of Queens County.

4. The United States Attorneys in Manhattan and Brooklyn, however, provided motion papers, briefs, transcripts and opinions relating to current motions alleging grand

(footnote continues)

Second, despite the prevailing public perception of widespread grand jury leaks, only one, the U.S. Attorney's Office in Brooklyn, acknowledged that an alleged breach of grand jury secrecy was under investigation.

Third, state prosecutors, unlike their federal counterparts, seem to have no written policies or procedures for investigating alleged violations of grand jury secrecy

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4. (footnote continued)

jury leaks during investigations conducted by those offices.

We have been unable to identify any allegations in recent years that state grand jury proceedings have been improperly disclosed to the media. In our poll of District Attorneys in New York City, no office could identify any past or current litigation on the subject. Even more surprising is the fact that no state prosecutor could specifically recollect or had statistics concerning any investigation or even allegation that grand jury information had ever been improperly disclosed to the press.

Although the Manhattan District Attorney's Office reported to us on three investigations of alleged unlawful grand jury disclosures, none of these involved leaks to the media. Two of these disclosures were made to grand jury targets, while the third involved the release of grand jury material to a complainant. (Letter of James M. Kindler, Executive Assistant District Attorney, New York County, June 10, 1987). The Queens District Attorney has informed us that his office has "over the years investigated alleged violations of Grand Jury secrecy" but was unable to describe those allegations. (Letter of Hon. John J. Santucci, District Attorney, Queens County, June 19, 1987).

rules.[5/] There seems to be substantial confusion in these offices, moreover, as to which agency has the authority to investigate such allegations.

Fourth, judging by the responses we received, there appears never to have been either a state or federal prosecution for unlawful grand jury disclosures to the media.

IV. The Historical Perspective

In light of the recent flurry of allegations that prosecutors are violating grand jury secrecy rules, it may be useful to examine the prior history of this problem in the New York area. For decades, at least, grand jury investigations of prominent or notorious individuals have been frequently attended by intense publicity. E.g., United States v. Nunan, 236 F.2d 576, 592-93 (2d Cir. 1956) (tax evasion investigation of former Commissioner of Internal Revenue Service resulted in "a series of sensational newspaper articles and radio and television publicity [in] 1952 . . . prior to and during the sessions of the Grand Jury"); United States v. Dioguardi, 20 F.R.D. 33, 34-35 (S.D.N.Y. 1956) (after arrest of defendant for acid-throwing

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5. As will be discussed below, federal procedures are set forth in the United States Attorneys' Manual. 28 C.F.R. § 50.2, et seq.; U.S. Attorneys' Manual 1-5. 501, et seq.

attack on newspaper columnist, United States Attorney "fed" sensational and prejudicial information to press).

In 1973, Mr. Chesterfield Smith, then president of the American Bar Association, asserted that "grand jury and prosecutorial leaks have . . . appeared as burgeoning problems of monumental proportion to the fair administration of justice and the civil rights of those under investigation." New York Times, Nov. 28, 1973 at 34, col. 2. Thus, as our necessarily abbreviated discussion reveals, there is nothing novel about the current spate of grand jury disclosures.

A. The 1973 Biaggi Disclosures

In the midst of Representative Mario Biaggi's 1973 mayoral primary campaign, newspapers disclosed his 1971 testimony before a federal grand jury investigating private immigration bills sponsored by members of Congress. On April 18, 1973, the New York Times, quoting "authoritative sources", published reports that the Congressman had invoked the Fifth Amendment no fewer than 30 times in response to that grand jury's questions concerning his finances. New York Times, April 18, 1973 at 1, col. 1. The 1971 investigation had ended without any charges being filed. See New York Times, September 23, 1987 at B4, col. 6.

After publication of the Times article, Biaggi categorically denied the report, claiming that the article was "part of a conspiracy to destroy [him]," New York Times, April 19, 1973, at 2, col. 3, and that he was the victim of "a plot, of attempted political and character assassination." New York Times, April 26, 1973, at 48, col. 1.

Biaggi, however, chose to waive the Rule 6(e) secrecy protection and moved to have Southern District of New York judges examine his testimony "for the sole purpose of determining whether or not I took the Fifth Amendment privilege or any other privilege on my personal finances or assets." In re Biaggi, 478 F.2d 489, 494 (2d Cir. 1973) (emphasis supplied).[6/] When the court revealed that Biaggi had indeed invoked his privilege against self-incrimination on 17 occasions, he was forced to withdraw as a mayoral candidate. Id. at 494. Although the Second Circuit directed "that the [United States Attorney's] investigation [of the disclosures] be further pursued," id. at 490 n.1, we are unaware of any public report on the results of that investigation.

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6. It appears that Congressman Biaggi's request was narrowly limited to his "personal finances or assets" in order to elicit a report suggesting that he had fully answered all the Grand Jury's questions, when in fact he had invoked the Fifth Amendment in response to other questions posed by that body. See In re Biaggi, supra, 478 F.2d at 494.

The fact that the Times' overstated report of 30, rather than 17, refusals to answer was attributed to "authoritative," rather than governmental, sources precludes any definite conclusion that a Rule 6(e) violation occurred. It is possible that this leak emanated from someone who had learned of the Congressman's testimony from Mr. Biaggi or his lawyers. As we have noted, a disclosure of this nature was not illegal.

B. The 1973 Mitchell/Stans Disclosures

Less than a month after the first Biaggi disclosures, a May 10, 1973 New York Times headline announced that "Indictment of Mitchell, Stans and Vesco is Expected Today in Political Gift Case." New York Times May 10, 1973, at 1, col. 8. This prediction proved to be correct. United States v. Mitchell, 372 F. Supp. 1239, 1262 (S.D.N.Y. 1973).

The Times attributed the information to "sources close to the investigation", an intentionally ambiguous phrase that could have been a reference to either the defendants or the Government. As a result of the article, John Mitchell and Maurice Stans sought to have the Southern District of New York indictment dismissed. Judge Gagliardi, however, denied the motion, finding affidavits from government prosecutors denying any improper disclosure sufficiently rebutted defendants' "conclusory allegations of

a 'leak'". United States v. Mitchell, supra, 372 F. Supp. at 1248.

C. The 1974-1975 Nadjari Office Abuses

In 1975-1976, prompted by what was then perceived as "the growing problem of improper disclosures of Grand Jury investigations", the New York State Temporary Commission on Investigation investigated reports that grand jury secrets had been disclosed to the press by the office of Maurice Nadjari, the Special Prosecutor appointed to investigate corruption in the City's criminal justice system. (State of New York, Commission on Investigation, The Nadjari Office and the Press (Nov. 18, 1976) (the "Nadjari Report")). The Commission disclosed a series of frightening and ominous abuses of grand jury secrecy, the effect of which was to injure the reputation of persons who were never prosecuted. The Commission also concluded that neither the Association of the Bar of the City of New York, the Administrative Board of the Judicial Conference, the Appellate Division nor the Attorney General of the State of New York "even informally acknowledged its role" as ethical keeper during the period in which these leaks occurred. (Nadjari Report at 43). According to the Nadjari Report, "had any one of [the aforementioned institutions] been even minimally vigilant, [the Nadjari office] excesses would doubtless have been

significantly diminished, if not eradicated." (Nadjari Report at 43).

Examples of improper disclosures identified in the Nadjari Report follow.

1. The "Twenty Judges"

Not long after his appointment as Special Prosecutor, Nadjari, according to the Report, embarked on a press campaign of identifying targets of ongoing or intended grand jury investigations. For example, Nadjari announced he had compiled a list of 20 corrupt judges. On November 20, 1972, the New York Daily News reported as follows:

> More than 20 city judges are under investigation to determine if they gave preferential treatment to mafia mobsters and big-time dope dealers, Special State Prosecutor Maurice Nadjari disclosed yesterday.
>
> Nadjari, appointed by Governor Rockefeller to probe corruption in the city's criminal justice system, said he is making a 'statistical survey' of the sentences handed out by 'more than 20' Supreme Court and Criminal Court judges.

(Nadjari Report at 36). After Nadjari made this statement to the press, his staff was instructed "to commence an investigation to justify the statement that had been made." (Id. at 38). As the Commission reported, "nothing came from [Nadjari's] analysis of judicial sentencing patterns" (id. at 40), except to "cast . . . a shadow over the reputations of all people in the named category -- e.g., all New York City Judges -- including many with hitherto deservedly untarnished reputations." (Id. at 38).

2. The Kiernan Case

Robert Kiernan was a former New York county Assistant District Attorney. A Nadjari grand jury investigated Mr. Kiernan concerning an attempted fix of a cocaine case while he was still a prosecutor. Kiernan, however, was never indicted. When subpoenaed, Kiernan had refused to sign a waiver of immunity and thus was not permitted to testify before the grand jury. A Nadjari office press release, which accompanied the indictment of two police officers and a defense attorney involved in that case, expressly noted the unidentified ADA's failure to testify without signing a waiver:

> The Assistant District Attorney who was involved in the conspiracy is presently in private practice in New York City. He has refused to testify without immunity before the Grand Jury. The Grand Jury is continuing in its investigation into the Assistant District Attorney's participation in the corrupt scheme.

(Nadjari Report at 9). As the Nadjari Report noted, "[i]t was, of course, but a short step for reporters" to identify Kiernan in their published stories. (Id.).

Although he conceded that there was not an indictable case against Kiernan, Nadjari's chief assistant, Joseph A. Phillips, informed the Commission that he had a "duty" to inform the public of Kiernan's refusal to sign a waiver. Apparently the Nadjari office felt it had an

obligation to inform the public of individuals that Nadjari and his chief aide considered to be "corrupt". When asked whether the disclosure of Kiernan's name in the press presented any problems, Phillips stated:

> I don't know. Justice comes to those who deserve it . . . I don't know that Kiernan was unjustly treated. I think just the opposite. I think he should have been indicted. We were unable to do that. In fact, I don't think a person who is corrupt should go around with a reputation of being honest . . . .

(Id. at 11).

3. The Brownstein Case

On March 20, 1974, Nadjari telephoned Brooklyn Supreme Court Justice Irwin R. Brownstein and requested that he appear the next day before a grand jury investigating an alleged conspiracy to bribe a judge. Judge Brownstein appeared on March 21, but refused to sign an immunity waiver. (Nadjari Report at 21).

At a Nadjari Office news conference that same morning announcing the indictment of two attorneys in the bribery scheme, it was also disclosed that a Brooklyn Supreme Court judge had been called before the grand jury but had refused to sign a waiver. The following day, Judge Brownstein was identified in a television news report. (Id.). On March 27, 1974, a New York Times article stated that

> a spokesman for the special state anti-corruption prosecutor, Maurice H. Nadjari, indicated that Mr. Nadjari also wanted to question Justice Brownstein about the purchase of court positions in Brooklyn through political payoffs.

(Id. at 97).

Although the two indicted attorneys had apparently invoked Judge Brownstein's name during the conspiracy, the supposedly "fixed" case had in fact never been assigned to him. Several weeks after the Nadjari press conference, Judge Brownstein waived immunity and testified before the grand jury. According to the Commission's Report, Brownstein

> was not questioned with respect to the above-noted bribery case, and that Grand Jury was ultimately dismissed.

(Id. at 21).

It appears that Brownstein was originally asked to testify because:

> Nadjari decided he could not announce the . . . indictment without being able to show that he had called Brownstein to testify. It seemed not to matter that [Nadjari's office] knew that Brownstein had nothing to do with the corrupt transaction . . . How would Nadjari explain not even having called the unnamed jurist cited in the indictment?

(Id. at 22).

As these and other examples detailed in the Nadjari Report indicate, the grand jury abuses of this period were egregious.

D. The 1977 F.A.L.N. Disclosures

On April 17, 1977, the New York Times published a front page story on the federal investigation of the 1975 F.A.L.N. bombings at Fraunces Tavern and elsewhere. New York Times, April 17, 1977, at 1, col. 2. The Times article purported to be based, in part, on non-public information derived from confidential law enforcement sources. Among other things, one Pedro Archuleta was identified as a "prime suspect", who had been asked to provide evidence to a Chicago grand jury. Id.

In response to Archuleta's motion to quash a Southern District of New York grand jury subpoena, Judge Lasker held that there was "no evidence that the New York investigation was the source of the story." In re Archuleta, supra, 432 F. Supp. at 599. This conclusion, as in previous cases, was based on an Assistant United States Attorney's affidavit denying disclosure by anyone associated with the New York investigation. Id. at 599. However, because the New York prosecutors were unable to deny that the Times' information could have come from federal sources elsewhere in the United States, the court directed that

> The United States Attorney for the Southern District of New York . . . conduct an investigation into any federal sources of improper disclosure concerning the F.A.L.N. investigation in the Southern District of New York and to report to the Court within thirty days on the progress of the investigation.

Id. at 599.

An in camera report was ultimately provided to Judge Lasker. That report apparently concluded that the New York Times reporter had obtained the information from a Colorado police officer, who in turn had obtained the information by means of FBI "Reports of Investigation" transmitted to him in the ordinary course of the investigation. Although paralleling information provided to the grand jury, it is not clear that these reports contained Rule 6(e) information or, if they did, that the Colorado investigator realized that the information he provided to the Times emanated from a grand jury.

E. The 1980 "ABSCAM" Disclosures

During the period February 2-9, 1980, a series of news articles appeared containing unauthorized disclosures regarding three separate Federal criminal undercover operations: "ABSCAM", "PENDORF" and "BRILAB". The Justice Department later concluded that these disclosures "were of a scope and magnitude virtually unprecedented in Department of Justice history." (United States Department of Justice, "Unauthorized Disclosures Regarding ABSCAM, PENDORF and BRILAB: A Public Report of the U.S. Department of Justice (January 14, 1981) ("ABSCAM Report")). The ABSCAM investigations led to an indictment in the Eastern District

of New York in 1980. United States v. Myers, supra, 510 F. Supp. 323. The defendants named in the Eastern District indictment subsequently moved to have the indictment dismissed.

As the court held, there was little question but that either prosecutors or FBI agents were sources for a "massive amount of pre-indictment publicity." Id. at 324. However, because the information disclosed to the media was largely obtained from undercover activities rather than a grand jury investigation, defendants' motion was not principally based on Rule 6(e). Nevertheless, because the "ABSCAM" disclosures were so clearly government-derived and involved disclosures that "indictments were forthcoming," an examination of this episode is instructive.

Judge Mishler accepted defendants' version of the basic facts:

> First, the voluminous appendices to the parties' papers, containing thousands of pages of reprinted newspaper and magazine articles as well as transcripts of radio and television broadcasts, attest to the fact that beginning on February 2, 1980 and continuing to the date of these indictments and beyond, the public was deluged with media reports of the ABSCAM investigation into defendants' activities. Moreover, many of these reports were replete with what may charitably be characterized as hostile statements and innuendo, treating the defendants' guilt as a foregone conclusion, itemizing the 'evidence' against them and reporting that 'indictments were forthcoming.' Finally, we must, in light of the government's admission of the fact, accept the contention that many of these

> reports contained information supplied by one or more Justice Department officials.

510 F. Supp. at 324-25.

The Myers court, however, denied defendants' motion to dismiss the indictment because of their failure to prove that they had suffered "actual prejudice" in the grand jury proceedings as a result of the publicity. Id. at 325-26:

> [W]e believe that it would be inappropriate to give the defendants a "windfall" by dismissing the indictment simply because some unidentified and possibly low-level member of the prosecutor's office failed to adhere to his duty.

Id. at 326.

As a result of the ABSCAM disclosures, "the Attorney General . . .instituted an investigation of the disclosures and publicly indicated that the responsible Justice Department employees will be dealt with severely." Id. at 328. As part of this investigation, hundreds of witnesses were interviewed and a number of prosecutors and FBI agents with access to the information obtained during the undercover and grand jury investigations were required to take polygraph examinations. The results of the Government's investigation were published in the ABSCAM Report. (ABSCAM Report at 7-8).

According to the Report, three Justice Department employees were disciplined in connection with ABSCAM-related disclosures: a United States Attorney, his First Assistant United States Attorney and an FBI Special Agent. (ABSCAM

Report at 7-8). At least one other FBI agent with access to ABSCAM information resigned before completion of the internal investigation.

The Justice Department censured two prosecutors in the Eastern District of Pennsylvania on the basis of information "voluntarily provided" by each. The United States Attorney himself admitted that, when he learned that NBC and the New York Times had obtained information about ABSCAM, he alerted the Philadelphia Inquirer to the Times story and provided confirmation to an Inquirer reporter of information the reporter had obtained elsewhere. The First Assistant U.S. Attorney conceded that he had provided, without attribution, a number of quotations to Philadelphia newspapers. Among other things, the Assistant United States Attorney told a reporter the following concerning a target and eventual defendant:

> He is amazing. It is amazing to all of us that we've never heard of him before. He was not known to us as a key player or a guy with this kind of incredible political muscle. . . . we were as flabbergasted as everybody else that this clown could deliver who he said he could deliver.

(ABSCAM Report at 7).

The FBI's New York Office "Media Representative", was suspended from work without pay for thirty days, placed on probation and reassigned from his press relations, in part, because

> a preponderance of the evidence establishes that [the FBI agent] was the source of a February 4, 1980 New York Times article which indicated that a subject of the ABSCAM inquiry was cooperating with the prosecution.

(ABSCAM Report at 8). The Report's conclusion was supported by the following evidence:

> [The FBI agent] was present at a meeting when the subject agreed to cooperate. After [the agent] left the meeting, however, the subject changed his mind and refused to cooperate. In addition, [after the agent's departures] another subject arrived to discuss his possible cooperation. That the February 4 article (written by the reporter with whom [the agent] had been in contact) mentions neither of these two late developments is strong circumstantial evidence that [the agent], who left the meeting and did not know of the developments, was the source for the article.
>
> This circumstantial evidence is reinforced by [the agent's] refusal to take a polygraph exam despite an official request that he do so.

(ABSCAM Report at 8).

The Justice Department's general conclusions are of particular relevance here. According to the ABSCAM Report, the simultaneous disclosure of the ABSCAM, PENDORF and BRILAB investigations

> appear to have resulted from separate, individual action on the part of various individuals, without approval or authorization from the Attorney General, FBI Director, or other managing officials of the Department of Justice, and without any general agreement or conspiracy.
>
> * * * *
>
> Motivations appear to have been as varied as the types of disclosures, ranging from pride and

self-promotion to pressures of preserving and protecting a covert investigation.

(Id. at 4-5).

V. Recent Disclosures

Counsel for defendants in five matters recently in the public eye have alleged that the Government leaked secret Grand Jury information to the press.[7/] Recognizing that several of these matters are still under scrutiny and that more information may yet emerge,[8/] we briefly describe the

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7. These five cases have been selected for two reasons. First, based on our survey of prosecutors, the public record and consultations with defense lawyers, these five matters appear to be the only instances in which grand jury leak claims have been litigated in this City during the past two years. Second, these matters appear to be the principal source of commentators' claims that grand jury leaks are a growing practice among prosecutors. E.g., In re Grand Jury Investigation (Esposito), supra, slip op. at 16; W. Safire, "Essay: Guarding the Guardians: The Latest Form of Third Degree", New York Times, Feb. 24, 1986 at A-15, col. 5.

8. Although some of these matters are pending before a court or are the subject of investigations, it is appropriate that we conduct our own analysis.

First, as we have noted, a number of commentators have already drawn widely-disseminated conclusions concerning these cases. As a result there is a widely-held perception concerning grand jury leaks that needs to be addressed in a timely fashion.

Second, the results of Government inquiries into grand jury press leaks are rarely disclosed to the public. See In re Grand Jury (Esposito), supra, slip op. at 20

(footnote continues)

publicly-available information in these five matters in the chronological order of the alleged improper disclosure.

A. Municipal Corruption

Beginning in early January 1986 with the attempted suicide of Queens Borough President Donald Manes, a massive amount of newspaper and television coverage was devoted to the unfolding New York City Parking Violations Bureau ("PVB") scandal. Press reports repeatedly attributed information concerning grand jury proceedings to "law enforcement

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8. (footnote continued)

(Government report on leak investigation to be presented to Court in camera). To our knowledge, moreover, no Rule 6(e) investigation has ever resulted in a contempt prosecution.

Third, with regard to any grand jury leak claim presently before a trial court or on appeal, we are confident that any resulting District Court or Second Circuit decision will be based on the record before it and will not be influenced by conclusions made about a particular case either by this Committee or other public commentators.

Finally, we wish to emphasize that this Report does not purport to provide a definitive answer concerning the source and nature of an alleged improper grand jury disclosure in any particular case. Instead, we have examined all recently-litigated grand jury disclosure cases in order to draw general conclusions concerning the overall nature of the problem. This kind of a general assessment is unlikely to emerge from any of the individual cases still pending in the courts or under investigation.

sources", "federal law enforcement authorities" or a "high Justice Department official". During the course of these revelations, one commentator "suspect[ed] . . . the hyper-ambitious Rudolph Giuliani or some operative" of being the source for the leaks. W. Safire, "Essay: Guarding the Guardians: The Latest Form of Third Degree", New York Times, Feb. 24, 1986 at A-15, col. 5.

In April 1986, in the course of investigations by three United States Attorney's Offices and a variety of local agencies, Stanley Friedman, Chairman of the Bronx Democratic Committee, and four other present and former city officials were indicted in the Southern District of New York. These defendants subsequently moved to dismiss the indictment on grounds of improper pre-trial publicity by the Government. United States v. Friedman, SS 86 Cr. 259 (WK). The defendants, however, did not seek a Rule 6(e) contempt hearing. As a result, the Government did not respond, as it had in other cases, by affidavit. Instead, the prosecutors argued that, under no circumstances, was dismissal of an indictment an appropriate remedy for improper Grand Jury disclosures. Judge Whitman Knapp, therefore, was able to deny defendants' motion without the more detailed consideration accorded traditional Rule 6(e) motions. As a

consequence we are confronted with a relatively undeveloped record.[9/]

The court at first reacted strongly to defendants' allegations. Addressing the prosecutors, the court said:

> God knows there has been plenty of publicity in this case and pretty outrageous publicity . . . I have never in my life seen a week's publicity about how the Government is trying to browbeat [an accomplice witness, Geoffrey Lindenauer] into pleading . . .
>
> * * * *
>
> [D]efendants make cogent arguments that the people in your office said things [concerning future grand jury actions] that were quoted and they subsequently came true.

(5/22/86 Hearing Tr. at 54) (emphasis supplied).[10/] The two Assistant United States Attorneys who then had principal responsibility for the investigation categorically denied in open court that any of the Grand Jury disclosures emanated

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9. A complete set of the newpaper articles considered by the court are included in the Joint Appendix to the appeal of defendants' convictions presently under consideration by the Second Circuit. United States v. Friedman, No. 87-1134 (2d Cir. 1987). In this Report, the Joint Appendix will be referred to as "Friedman App.".

10. This is a reference to the transcript of a hearing before Judge Knapp on May 22, 1986 concerning defendants' omnibus pretrial motions.

from the United States Attorney's Office. (5/22/86 Hearing Tr. at 54 and 76).[11/]

In a May 29, 1987 opinion, the court apparently concluded that, while the news articles did not support a conclusion that the leaks necessarily emanated from the United States Attorney's Office, they did appear to have originated somewhere in the Justice Department:

> [D]efendants [have] amassed a considerable body of evidence suggesting that one or more employees of the Department of Justice have violated Fed. R. Crim. P. 6(e) by disclosing evidence that was presented to the Grand Jury. Indeed, unless the media was wholly irresponsible in continually asserting that the source of these revelations was someone in the Department of Justice who was asking not to be identified, it may well be said that such improper disclosure has been established by the sheer number of newspaper articles citing such an authority in providing information that turned out to be accurate. However, the question remains whether or not this Court is in the position to take effective action to remedy the situation.
>
> It may well be that the Attorney General of the United States would be interested in ascertaining which of his employees was engaged in violating one of the statutes he or she was sworn to uphold, or that Congress might deem such an inquiry appropriate.

United States v. Friedman, supra, slip op. at 9. Judge Knapp's refusal to dismiss the indictment because of the

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11. At the hearing on the pre-trial publicity issues and other defense contentions, one Assistant represented as follows: "I want to state very strenuously that those leaks did not come from the United States Attorney's Office." (5/22/86 Hearing Tr. at 54).

disclosure is presently on appeal to the Second Circuit. United States v. Friedman, No. 87-1134 (2d Cir. 1987).

The PVB disclosures demonstrate some of the central problems of grand jury leaks, including the difficulty of preventing grand jury leaks in investigations involving numerous state and federal agencies and of determining proper remedies when such problems are uncovered.

The PVB case also demonstrates the degree to which the nature and extent of grand jury disclosures can be exaggerated and distorted if the facts are not carefully scrutinized. This is best exemplified by a February 22, 1986 New York Times article concerning the PVB scandal and the reaction to it two days later by well-known Times columnist, William Safire. In the first Times piece, a reporter, Michael Oreskes stated that:

> Federal prosecutors said yesterday that they would ask a grand jury next week to indict a key figure [Geoffrey C. Lindenauer] in the New York City corruption scandal unless he agreed to cooperate in their investigation of Donald R. Manes and other officials.

(Friedman App. 131). Three days later, on February 25, Mr. Lindenauer was in fact indicted. (Friedman App. 133).

On February 24, 1986, two days after the article appeared, the Times published Safire's "Op-Ed" piece accusing Rudolph Giuliani of being the source for the February 22 article. (Friedman App. 132). Although Mr. Safire conceded

that: "I have not discussed this story with the reporter [Michael Oreskes] or any of the Times editors", Mr. Safire opined that:

> I suspect the federal prosecutor quoted from his safe position in ambush is the U.S. Attorney in New York City, the hyper-ambitious Rudolph Giuliani or some operative conducting this third-degree [of Mr. Lindenauer] with his guilty knowledge.
>
> In this outrageous abuse the don't-identify-me prosecutor betrays his contempt for the grand jury system. . . . Prosecutors' threats to witnesses to seek indictments are common, but a public prediction of a criminal charge unless a witness cooperates is new. . . .
>
> In the exposure of fraud and bribery, the unidentified "senior federal prosecutor" apparently figures, anything goes.

(Friedman App. 132).

While an "Op-Ed" piece can be expected to take certain liberties and engage in a certain amount of hyperbole and speculation, the Oreskes story did not provide a reasonable basis for Safire's accusations.

First, despite its lead sentence, the body of the February 22 article suggests that its source was not "federal prosecutors", as Safire misleadingly states, but rather "Federal law enforcement officials" who were providing information they had obtained from federal prosecutors. (Friedman App. 131). Moreover, Safire's claim that the February 22 article describes one of its sources as a "'senior Federal prosecutor'" is incorrect. (Friedman App.

132). Although surrounded with quotation marks in the Safire piece, the purportedly-quoted phrase appears nowhere in the February 22 article.

Second, the timing of the disclosure is completely inconsistent with Safire's theory that these statements were "part of [a] strategy to pressure Mr. Lindenauer into cooperating." The article that was supposedly intended to "pressure Lindenauer into cooperating" appeared on Saturday, February 22. (Friedman App. 131). Lindenauer was indicted only two days later on Monday morning, February 24. (Friedman App. 133).

Third, it is hard to accept that an experienced prosecutor would find it necessary to use press leaks as a means of inducing an arrested person to cooperate. As even Mr. Safire conceded, "a public prediction of a criminal charge unless a witness cooperates is new". (Friedman App. 132).

The problem of grand jury leaks cannot be dealt with adequately if it is misperceived and distorted beyond recognition. While it appears that federal officials somewhere were leaking grand jury secrets, all available information regarding the February 22 disclosure suggests that it arose outside the office of the prosecutor directly in charge of the investigation. Of course, this conclusion

does not mitigate the seriousness of the illegal leaks that occurred during the PVB investigation. It does suggest, however, that the problem and its solution are much more subtle than Mr. Safire's piece suggests.

B. Meade Esposito/Mario Biaggi

In June 1986, following the execution of a search warrant on the offices of Meade H. Esposito, a former Brooklyn Democratic party leader, a number of newspaper articles were published disclosing the existence and purposes of a grand jury investigation of both Esposito and Congressman Mario Biaggi. See In re Grand Jury Investigation (Esposito), supra, slip op. at 2-7. That investigation ultimately resulted in the indictment, trial and, on September 22, 1987, the conviction of Messrs. Esposito and Biaggi. United States v. Esposito, 87 Cr. 151 (JBW) (E.D.N.Y. 1987).

The first articles appeared in the New York Post and Daily News on June 4, 1986. The Post story described the execution of a search warrant at Esposito's office and reported that "grand jury subpoenas are in the works and indictments may include charges of bribery, conspiracy and mail fraud, sources said." The article described the inquiry as focusing on "suspected business links between former Brooklyn Democratic leader Meade Esposito and an alleged

cop-killer member of the Genovese crime family." Edward McDonald, head of the Organized Crime Strike Force, is cited as confirming the existence of an investigation, but refusing any further comment.

On June 5, the New York Times quoted law enforcement officials, who asked not to be identified, as saying the grand jury subpoenas had been issued as "part of an examination of the Brooklyn Democratic organization" touched off by the fatal shooting of a police detective and the wounding of his partner. That day, Newsday quoted a "federal source" as stating that the inquiry had been "underway for several months and that Congressman Biaggi, among others, was under investigation."

Subsequent articles in June in various newspapers continued to quote "federal law enforcement officials" "sources", one "Justice Department official" and "federal officials" concerning, among other things, "bugs" and wiretaps that intercepted Esposito conversations.

There were no further articles on the subject until January 7, 1987, when the New York Post published a lead article with the headline "Feds Want to Indict Biaggi and Esposito". The article quoted "sources" as saying that the Brooklyn United States Attorney's Office has told top Justice Department officials that "a grand jury has heard enough

evidence over the past seven months to indict" Biaggi and Esposito. According to these "sources", "the investigation involves allegations that Biaggi used his influence to help a near-bankrupt Brooklyn ship repair company, Coastal Dry Dock and Repair Co., that also allegedly owed $600,000 in premiums to Esposito's insurance company." The article also stated that the grand jury was seeking to determine who had paid for a trip by Congressman Biaggi to Florida in 1985. Both Edward McDonald and United States Attorney Andrew Maloney were said to have declined comment. On January 8, 1987, the Post, Daily News and Newsday all reported on the wiretapped conversations between Mr. Esposito and Congressman Biaggi concerning payment of Biaggi's Florida hotel bill.

Shortly thereafter, Mr. Esposito filed a petition in the Eastern District of New York, that was subsequently joined by Congressman Biaggi, seeking an order, among other things,

(1) Requiring an evidentiary hearing to identify the sources of the leaks;

(2) Appointing a special counsel to investigate the source of the leaks;

(3) Barring any further action by the grand jury with respect to this investigation;

(4) Requiring the investigation to be conducted by a newly-empanelled grand jury; and

(5) Reassigning the investigation to a special prosecutor.

In its response, the Government submitted an affidavit by Mr. McDonald denying governmental responsibility for many of the "press leaks", noting that much of the information contained in the stories was available from other sources such as open court statements by Biaggi's attorney in connection with an earlier motion to quash a grand jury subpoena. The affidavit, however, also conceded that other stories may have been leaked by government agents in violation of the grand jury secrecy provisions.

The McDonald affidavit also described the government's response to the news reports, which included:

(1) Repeated admonishments of grand jurors not to read or listen to media reports concerning the investigation;

(2) A polling of grand jurors to determine whether any reports they may have read affected their impartiality; and

(3) Commencement of an investigation to determine who was responsible for the press reports.

Mr. McDonald asserted further that neither McDonald nor any of the six other Justice Department attorneys with access to the prosecutive memorandum referred to in the News articles had made any unlawful disclosure.

On February 23, 1987, the court ruled that Esposito and Biaggi had established a prima facie violation of Rule 6(e). The court, however, declined to grant the relief requested by Esposito and Biaggi. First, having personally

polled the Grand Jury to determine whether the press reports had impaired that body's impartiality, the court found it "inappropriate to grant petitioners' requests to bar the present grand jury from further consideration of this case, to require that the case be presented to a newly empanelled grand jury, or to reassign the investigation to a special prosecutor." In re Grand Jury Investigation (Esposito), supra, slip op. at 17. The court also denied Esposito and Biaggi's request for an immediate evidentiary hearing so as not to disrupt or compromise "the grand jury's ability to effectively conclude its investigation". Id. at 19.

The court, however, directed the Government to report, in camera "on both the nature and results of the internal investigation it is conducting into this affair....Based on the results of these investigations, the Court will determine whether future action, including the holding of contempt hearings is appropriate." Id. at 20.

In addition to the United States Attorney's inquiry, the grand jury disclosures are being investigated by the Justice Department Office of Professional Responsibility and by the Office of Professional Responsibility of the Federal Bureau of Investigation. Id. at 21 n.5.

On March 16, 1987, both Esposito and Biaggi were indicted on charges relating to gratuities provided by

Esposito to Biaggi in connection with vacation trips. On March 18, the New York Times carried a front page story headlined "Investigators say F.B.I. Taped Esposito with a Crime Figure." In the article, "law enforcement officials," who have "asked for anonymity," were quoted as saying that the taped conversations were intercepted during an investigation of the Genovese crime family:

> Two months after the inquiry began it branched off in the direction of Mr. Esposito when he was heard talking with Mr. Giovanelli [an "organized crime figure"] investigators said. The discussions were picked up as part of court-authorized telephone taps, the investigators said, provided the F.B.I. with leads about the selling of democratic judgeship nominations and the fixing of civil court cases in Brooklyn.

New York Times, March 18, 1987 at 1, col. 1. During the evening of March 18, 1987, a Channel Four news program broadcast excerpts from apparently verbatim transcripts of conversations intercepted during the Esposito investigation. (3/19/87 Hearing Tr. at 5).[12/]

On March 19, 1987, the parties appeared before Chief Judge Jack Weinstein to whom the case had been transferred from Judge Sifton. At that hearing, the Government informed the court that the Justice Department was continuing its investigation:

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12. This is a reference to a transcript of a March 19, 1987 hearing before Chief Judge Weinstein concerning defendants' renewed Rule 6(e) motion.

> I should point out that the investigation is being conducted by the Office of Professional Responsibility of the United States Department of Justice. They have been communicating and reporting to Judge Sifton.

(3/19/87 Tr. at 13). Judge Weinstein then stated:

> It is the firm view of the judges of this court, the United States Court for the Eastern District of New York, that cases should not be tried in the newspaper or on TV or in any other media and that the rules with respect to secrecy of the Grand Jury, with respect to secrecy of wiretaps and bugs and alike should be scrupulously observed.

(3/19/87 Tr. at 14-15).

According to an order signed by Judge Sifton on March 16, 1987, the Government was ordered to provide a written report on the progress of the investigation by April 16, 1987. The docket sheet for this proceeding does not reveal whether or not the Government has since reported to either Judge Sifton or to Judge Weinstein on its investigation.

C. Insider Trading

On February 12, 1987, Robert M. Freeman, head of Goldman Sachs & Co.'s risk arbitrage department and Richard B. Wigton and Timothy Tabor of Kidder, Peabody & Co. were arrested on charges arising out a major inside trading investigation. The arrests were followed by an April 9, 1987 "bare bones" indictment in the Southern District of New York. United States v. Freeman, 87 Cr. 293 (S.D.N.Y.).

Although the Government announced its intention to seek a more detailed superseding indictment, Judge Louis L. Stanton denied the Government's motion for additional time and set trial for May 20. Rather than accede to that trial date, the Government, as the court had suggested, moved to have the indictment dismissed so that the grand jury could investigate the case further.

On May 18, 1987, while the Government's motion was pending, all three defendants alleged, among other things, that in a May 14, 1987 Wall Street Journal article United States Attorney Rudolph W. Giuliani had stated that witnesses were then providing testimony to the Grand Jury that could lead to additional charges against the defendants.

On May 19, 1987, Judge Stanton granted the Government's motion to dismiss the pending indictment. After the dismissal, however, the Government continued the grand jury's investigation of Messrs. Freeman, Wigton and Tabor. On May 29, 1987, Freeman and Tabor, but not Wigton, filed a motion in Part I before Judge Shirley Wohl Kram. In re Freeman, M 11-188 (S.D.N.Y. 1987). In addition to asserting their prior claim concerning the May 14 Journal article, Freeman and Tabor added allegations concerning a more recent Journal piece.

In relevant part, the May 14 article states:

> In an interview, U.S. Attorney Rudolph W. Giuliani said the government has recently granted immunity from prosecution to potential witnesses who had previously invoked the Fifth Amendment protection against self-incrimination and had refused to testify. The witnesses are now providing testimony and records that could lead to more charges against the three men and to the naming of additional defendants, Mr. Giuliani said. He declined to identify the witnesses or possible defendants.

Wall Street Journal, May 14, 1987 at 3, col. 1.

The new claim made by Freeman and Tabor in the renewed motion concerned a May 22, 1987 Wall Street Journal article purporting to reveal additional, previously non-public, details of the grand jury investigation. Attributing its information to "people familiar with the Government's investigation", the Journal stated that eight previously unidentified stocks were involved in the case. The article stated that "[t]he government is looking into whether Mr. Freeman may have leaked inside information" concerning those eight companies. Wall Street Journal, May 22, 1987 at 3, col. 1.

With regard to these disclosures, the Government asserted that the May 14 article inaccurately paraphrased Mr. Giuliani's statements to the newspaper and that those actually made by the U.S. Attorney were properly based on matters in the public record, namely an affirmation filed by an Assistant United States Attorney before Judge Stanton on

May 13, 1987. (See 5/13/87 Cartusciello Aff. ¶¶ 7-8).[13/] The Government's claim that Mr. Giuliani was inaccurately paraphrased was supported by an in camera affidavit purportedly establishing that Giuliani had not made the statements attributed to him.

The Government also denied that it was the source of the disclosures made in the May 22, 1987 Journal article. By affidavit, the prosecutor in charge of the case asserted that, based on inquiries with "attorneys in this Office and investigators and other Government personnel who are assisting us in this investigation, we are confident that no...attorney, investigator or other Government employee was the source of any...information" published in the Journal article. (6/4/87 Cartusciello Aff. ¶ 18).

Instead, the Government alleged that "somebody working with one of the defense teams is certainly a possible source of the disclosures to the press." As the Government pointed out, because both the movants (Freeman and Tabor) and Wigton had reviewed most of the documents subpoenaed by the

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13. This is a reference to a May 13, 1987 affirmation filed by Assistant United States Attorney Neil Cartusciello explaining the reasons for the Government's 5/13/87 motion to dismiss the indictment. A subsequent Government affidavit will be referred to as "6/4/87 Cartusciello Aff.".

grand jury, persons on the defense side could readily have deduced that the grand jury was investigating transactions in the stock of the eight additional companies. In addition, the Government noted that the subpoenas served on Goldman, Sachs, "which Goldman, Sachs has evidently shared with the defendants", on their face revealed "nearly all of the non-public information contained in the May 22 article." (6/4/87 Cartusciello Aff. ¶ 20.)

Finally the Government noted that, even before it had been served with defendants' renewed motion, reporters, evidently alerted by a defendant or his counsel, contacted the U.S. Attorney's Office to advise that the motion would be filed under seal the next day. (6/4/87 Cartusciello Aff. ¶ 21).

Despite the fact that Wigton had joined in defendants' initial claim before Judge Stanton, Wigton did not subscribe to the motion filed only eleven days later. As we have seen, the motion differed from the original claim only in that it added allegations relating to the May 22, 1987 Journal article that had quoted unidentified "people familiar with the Government's investigation".

Judge Kram denied Freeman and Tabor's motion on July 8, 1987, finding that movants had failed to satisfy the Lance standards for establishing a prima facie case of

government misconduct. In re Freeman, [1987 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 93,325 at 96,650 (S.D.N.Y. July 8, 1987).

D. Wedtech

On April 1, 1987, Stanley Simon, the former Bronx Borough President, was indicted in the Southern District of New York on charges relating to Wedtech, purportedly a minority-owned defense contractor. United States v. Simon, 644 F. Supp. 780 (S.D.N.Y. 1987). On May 28, 1987, Simon filed a motion before Judge Cannella alleging, among other things, that the Government had violated Rule 6(e).

In support of his motion, Simon submitted copies of twenty newspaper articles and a partial transcript of one television news report. Among other things, these reports discussed the timing of the as yet unfiled superseding indictment, predicted that additional defendants would be named in that new indictment and quoted Bronx District Attorney Mario Merola discussing the case.

The Government pointed out, however, that more than ninety percent of the sources were not named or described with specificity in these press reports. The materials presented by Simon contained 28 references to "sources" or "sources close to the investigation" or similar language; 33 references to "law enforcement sources" or "investigators" or

similar language; 4 references to "officials" or "Bronx County officials" or similar language; 7 references to "prosecutors"; and 6 references to "former Wedtech officials" or "Wedtech employees" or employees. The Government argued, therefore, that a number of the sources could have been persons such as grand jury witnesses and defense lawyers who are not under any secrecy obligations.

Only four of the news reports attributed their information to a specific law enforcement office. First, in a May 25, 1987 article, the Washington Times stated that "sources at the Bronx District Attorney's Office" predicted that "state and local politicians" would be named in the superseding indictment. The Government, however, pointed out that this disclosure could not have been a Rule 6(e) violation since the additional defendants named in the superseding indictment were both federal officials. By means of a sealed affidavit, the Government apparently offered evidence that other purported grand jury disclosures in the article were also erroneous.

Second, in a May 21, 1987 article, the New York Daily News reported, without ascribing a source, that District Attorney Merola had no knowledge of plea negotiations with Mario Biaggi. An Assistant United States Attorney's affidavit filed in opposition to Simon's motion,

reported that Mr. Merola had denied ever commenting to anyone concerning supposed plea negotiations with the Congressman. (6/12/87 Shannon Aff. ¶ 7(b)).[14/] Through the Assistant's affidavit, however, District Attorney Merola acknowledged having replied in response to a "barrage of questions" that the superseding indictment was "imminent". The Government, however, contended that this information had previously been made public by the U.S. Attorney's Office in court proceedings.

Third, in a May 28, 1987 New York Times article, Mr. Merola was quoted as acknowledging the role his Office was playing in the Wedtech investigation and stating that "more indictments" would occur. New York Times, May 28, 1987 at B-1, col. 2. The Government asserted, however, that this information had also previously been a matter of public record.

Finally, the May 31, 1987 edition of the New York Times, quoted Merola as stating at a press conference announcing Simon's indictment that "they [the defendants] paid everybody... They thought that was the way of doing business." New York Times, May 31, 1987 at A-20, col. 1.,

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14. This is a reference to a June 12, 1987 affidavit by Assistant United States Attorney Mary Shannon.

col. 1. According to the Government, this statement did not violate Rule 6(e) because it was based on the allocutions and guilty pleas of four former Wedtech officials.

The Government also asserted that efforts had been made to determine whether any of the unidentified sources had been a federal official. According to the affidavit, "[t]he Government has not uncovered a single instance of improper disclosure of information by Government personnel and has no reason to believe that there have been any such disclosures by Government personnel." (6/12/87 Shannon Aff. ¶ 8).

On June 17, 1987, the court ordered that Simon's motion be taken up after trial. United States v. Simon, 86 Cr. 93 (CBM) (S.D.N.Y. 1987).

E. Bess Myerson/Carl Capasso

On January 9, 1987, WNBC television broadcast a report that Bess Myerson, New York City's Commissioner of Cultural Affairs, had invoked the Fifth Amendment in December 1986 testimony before a Southern District of New York grand jury probing her boyfriend Carl Capasso's contracts with New York City. Because of Mayor Koch's prior vow to fire any city official who did not cooperate fully with an anti-corruption investigation, this news ultimately led to her resignation.

On September 24, 1987, the New York Post carried an article which was headlined "Feds Zero in on Indictment." The article stated that "[s]ources close to the investigation said authorities huddled as recently as last week to discuss whether to ask a grand jury to indict the former Miss America." Among other things, the sources were said to have disclosed that prosecutors in the Southern District of New York were considering bringing mail fraud and civil rights charges against Myerson for her role in appointing to a city job the daughter of Hortense Gabel, the judge who was presiding at an alimony dispute between Carl Capasso and Capasso's ex-wife. New York Post, September 24, 1987 at 13, col. 1.

On October 7, 1987, Bess Myerson, Carl Capasso and Judge Gabel were indicted on charges arising out of these allegations. United States v. Meyerson, 87 Cr. 796 (S.D.N.Y. 1987). On December 7, 1987, defendants filed a motion seeking a hearing regarding the disclosure of Ms. Myerson's Fifth Amendment plea.[15/]

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15. The court papers and other materials that are now public regarding this motion were either not yet filed or not yet public at the time this Report was approved by the Committee and hence form no part of our discussion here.

On January 22, 1987, in the Southern District of New York, Carl A. Capasso pleaded guilty in an unrelated case before Judge Charles E. Stewart to nine counts of tax evasion. United States v. Capasso, 87 Cr. 41 (CES) (S.D.N.Y. 1987). That same day, Capasso filed an application seeking an evidentiary hearing, the appointment of special counsel and a bar to any further action by the "present grand jury because of prosecutional leaks of grand jury information and materials to the press". In re Capasso, M11-188 (CES) (S.D.N.Y. 1987).

The press reports concerned a grand jury investigation commencing in the middle of 1986 into Capasso's business dealings. The story of this investigation was first broken by the Daily News and the Queens Home Reporter and Sunset News, a low-circulation, neighborhood tabloid. This report and those that followed disclosed that the grand jury investigating Capasso was contemplating charges of racketeering, mail fraud, extortion and tax evasion. The newspapers attributed this information to "investigators", "law enforcement officials" or "sources close to the investigation."

In response, the Government, through an affidavit of an Assistant United States Attorney, categorically denied that it was the source for any of these stories. (2/10/87

Lawrence Aff. ¶ 7).[16/] According to the Government, these reports "reveal little more than the information which is on the face of a subpoena or which a subpoenaed witness would learn during the course of questioning or from the act of preparing a responsive document production." (Government's Memorandum of Law in Opposition at 12). It appears, moreover, that in an affidavit submitted to the Court in camera the Government demonstrated the inaccuracy of press reports concerning the supposed playing of tape recordings to the grand jury or Commissioner Myerson's purported appearance before that body.

On February 19, 1987, Judge Stewart ruled that

> it seems more than likely that the sources from which the newspapers have been obtaining the limited information contained in the news articles have been persons subpoenaed and the subpoenas themselves, witnesses before the Grand Jury and city officials. In any event, there is no evidence to support the contention that the U.S. Attorney's office has acted improperly.

In re Capasso, supra, slip op. at 2.

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16. This is a reference to the February 10, 1987 Affidavit of Assistant United States Attorney David Lawrence filed in opposition to Capasso's motion.

VI. Are Grand Jury Leaks a "Growing Practice Among Prosecutors"?

Having examined both the history of grand jury leaks and recent allegations of unlawful grand jury disclosures, it is now time to test the generally-held perception that grand jury secrecy violations are a "growing practice among prosecutors". A reasoned and even-handed appraisal of this problem requires that we both examine the current disclosures in a proper historical perspective and assess the role played by all participants in the process. We attempt to provide that analysis below.

For the reasons discussed below, we do not believe that the current rash of disclosures are either unprecedented or necessarily the result of a sudden breakdown in prosecutorial ethics. Instead, the subtle, multi-faceted nature of this problem suggests that more is required than the "gnashing of judicial [and other] teeth" against supposed prosecutorial misconduct. In re Archuleta, supra, 432 F. Supp. at 599.

A. Grand Jury Disclosures Rise in Proportion to "Newsworthy" Investigations

In light of the 1973 Biaggi and Watergate leaks, the Nadjari Office abuses in 1974-1975 and the 1980 ABSCAM Leaks, one should hesitate to describe the current disclosures as a "real increase" or a "growing practice". Grand Jury

disclosures ebb and flood with the notoriety of the crimes or targets under investigation.

As our own review suggests, and as the courts have repeatedly acknowledged, sensational publicity inevitably arises during criminal investigations of "prominent or notorious" individuals. United States v. Myers, supra, 510 F. Supp. at 326, citing United States v. Mandel, 415 F. Supp. 1033, 1063 (D. Md. 1976), aff'd, 602 F.2d 653 (4th Cir. 1979) (en banc). Accord United States v. Nunan, supra, 236 F.2d at 593; Silverthorne v. United States, 400 F.2d 627, 631 (9th Cir. 1968), cert. denied, 400 U.S. 1022 (1971). In a 1962 case concerning leaks in a grand jury investigation of attempted case-fixing by a New York Judge and the Chief Assistant United States Attorney in Brooklyn, Judge Weinfeld observed that:

> We live in a world of reality. Serious accusations against public officers and public figures are bound to receive publicity through all the avenues of modern communications. . . . These are facts that cannot be downed.

United States v. Kahaner, 204 F. Supp. 921, 924 (S.D.N.Y. 1962), aff'd, 317 F.2d 459 (2d Cir. 1963), cert. denied, 375 U.S. 835 (1963). In light of recent history, therefore, it seems that 1987 was unusual only in the large number of newsworthy investigations and prosecutions.

This observation, of course, provides no comfort to the victims of grand jury leaks. Nor should it to those of us who, as judges, prosecutors or defense lawyers, are also participants in the criminal justice system. History, however, does not support any conclusion that grand jury leaks have reached unprecedented proportions.

B. The "Leak"/Disclosure Distinction: Grand Jury Witnesses and the Press

As we have noted, grand jury witnesses and their counsel are not subject to either federal or state secrecy rules. Thus, where a newspaper story is based on such a source, it is not in fact an impermissible "leak" but rather an entirely legal "disclosure". In our view, commentators, who have inveighed against "a real increase in leaks" or a "troubling breakdown in confidentiality," have ignored this important distinction. Indeed, we have seen that a substantial percentage of the 1987 news reports complained of by those commentators were probably "disclosures" rather than "leaks".

Our survey of past and current disclosure cases reveals that newspaper disclosures of grand jury investigations are frequently attributed to "sources close to the investigation", "sources familiar with the investigation", "authoritative sources", "people familiar

with the Government's investigation" and the like. Although, at first blush, these references might lead one to conclude that a public official was the source, these ambiguous phrases are frequently references to witnesses, targets or their lawyers. E.g., In re Capasso, supra, slip op. at 11; United States v. Mitchell, supra 372 F. Supp. at 1246; United States v. Kahaner, supra, 204 F. Supp. at 922-23.[17/] Alternatively, a reporter with access to a grand jury subpoena duces tecum -- from which a great deal can often be deduced -- could make conclusions which his article ascribes to "law enforcement sources" or the "investigation". See, e.g., In re Freeman, supra, [1987 Transfer Binder] CCH Fed. Sec. L. Rep. at 96,649.

Upon first consideration, one might question why a target of, witness in, or attorney defending against a grand jury investigation would seek to generate publicity. In our

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17. Even press references to "investigators" or "law enforcement officials" do not compel the conclusion that a disclosure was a "leak". A defense attorney, for example, could inform a reporter of a prosecutor's actions or statements. By not disclosing the hearsay nature of his information, that reporter, in order to disguise his source or to give the story added impact, might attribute the information "to law enforcement sources". See In re Capasso, supra, slip op. at 11 ("more than likely" that information attributed to "investigators and law enforcement officials", among others, was obtained from "persons subpoenaed and the subpoenas themselves").

experience, however, such disclosures are not uncommon. Often, we suspect, they come, not from the target or his counsel, but from a co-target who is now cooperating with the Government and has a motive to impugn the target in the grand jury and in the press. More generally, some defense lawyers, like some prosecutors, may seek to advance their own careers by fostering close relationships with the press. Finally, grand jury witnesses or targets or their attorneys may confide in or seek advice from third parties, who may have their own independent reasons for disclosing such a confidence to the press.

C. The Prosecutor/Investigator Distinction

We also believe that a distinction should be made between leaks by prosecutors in charge of the investigation and those made by investigators or prosecutors in other offices.[18/] While both kinds of leaks are equally illegal, one of the prices we pay for our federal system and for the diffusion of national and local police power into a number of

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18. Of course, if an investigator is employed by a prosecutor or under his immediate supervision, a prosecutor "shall exercise reasonable care to prevent" such an employee from violating grand jury secrecy rules. N.Y. Judiciary Law, Appendix, Code of Professional Responsibility, DR 7-107(J) (McKinney's 1975).

agencies and jurisdictions is a resulting multiplicity of entities with access to confidential information.

Our review of the 1987 disclosures has demonstrated that, in complicated or high profile investigations, the prosecuting attorney is often only a single link in a long chain of federal and state officials with access to secret information. In the Wedtech investigation, for example, in addition to the U.S. Attorney's Office in the Southern District of New York, the following agencies had access to confidential information: U.S. Attorney's Office for the District of Maryland, Bronx County District Attorney's Office, Federal Bureau of Investigation, Small Business Administration, United States Department of Labor, United States Department of Defense, Internal Revenue Service, New York City Department of Investigation, New York City Police Department and Independent Counsel James McKay. The PVB corruption scandal had its origins in an investigation in Chicago and involved overlapping investigations by a number of state and Federal prosecutors.

This dissemination of confidential information through a number of prosecutive and investigative agencies, many of whom may not be accountable to the prosecutor in charge of a grand jury investigation, makes it difficult for that prosecutor to prevent leaks. Indeed, the more remote a

particular agency is from the court supervising a grand jury investigation, the more likely it is that a leak will emanate from that source.

It is the experience of current and former prosecutors on this Committee that investigators, because of their numbers and relative distance from grand jury proceedings, are better able to cloak a leak with anonymity. While, in many cases, prosecutors are either blamed for a leak or personally held to account by means of affidavits and other personal assurances to a court, investigators with access to grand jury material are rarely identified with, much less required to disavow, a leak. Furthermore, because an investigator is often gauged by arrests rather than convictions, he is less likely than a prosecutor to be concerned with the consequences of a leak to the media.

It is also true that an adversarial relationship often exists between investigators and prosecutors. Investigators, for example, sometimes use newspaper disclosures in an attempt to goad reluctant prosecutors into action.

Courts have recognized, as do we, that police forces and other investigative agencies are generally not accountable to prosecutors. As Chief Judge Weinstein noted in response to the Esposito/Biaggi disclosures: "I

understand that your [defense counsel] can't and they [the prosecutors] can't control what other agencies do." It is for this reason that we believe that neither blame for, nor measures aimed against, government leaks should be directed solely against prosecutors.

D. Are Prosecutors Leaking?

This Committee is unable to concur with the Esposito court's conclusion that grand jury leaks, as reprehensible as they surely are, are either a "growing practice" or one engaged in primarily by prosecutors. Our analysis of recent disclosures does not support this conclusion. The record before the Esposito court, moreover, was bereft of any additional evidence that grand jury leaks are either "prevalent" or the result of a growing practice among prosecutors. The court's only support for its assertions were citations to several inapposite Second Circuit and Southern District of New York decisions.

For example, the court's assertion that the Second Circuit "has on several occasions decried the prevalence of grand jury leaks and the need to impose sanctions for improper prosecutorial conduct" is supported by citation to only two cases. In re Gilboe, 699 F.2d 71, 78 (2d Cir. 1983); United States v. Flanagan, supra, 691 F.2d at 124-25. Neither of these decisions, however, concerned allegations of

an actual Rule 6(e) violation. Instead, both involved Fifth Amendment claims by immunized grand jury witnesses that their testimony, if compelled, could subject them to prosecution in foreign countries because that testimony might in the future be "leaked" or otherwise disclosed. Rather than "decrying" the prevalence of prosecutorial leaks, the Second Circuit found the risk of such disclosure "too remote and speculative" to support the witnesses' Fifth Amendment claim. In re Grand Jury Subpoena of Flanagan, supra, 691 F.2d at 124. Accord In re Gilboe, supra, 699 F.2d at 78 (while grand jury leaks "possible", no real likelihood that the witness' testimony will be disclosed).

The Esposito court's claim that Rule 6(e) violations "seems to be growing practice among prosecutors" is based on a citation to a single, ten year-old Southern District of New York opinion. In re Archuleta, supra, 432 F. Supp. at 599. In Archuleta, Judge Lasker found that, in 1977, "[b]reaches of grand jury secrecy have been occurring with disturbing frequency." Obviously, this 1977 finding hardly supports the Esposito court's view that such practices are "growing" in 1987.[19/] In any event, Judge Lasker did not ascribe the

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19. Judge Lasker's concerns with the "disturbing frequency" of grand jury disclosures was supported only by a May 1977 New York Times report that the Attorney General

(footnote continues)

Archuleta leaks to prosecutors in New York.[20] Indeed Judge Lasker found "no evidence that New York investigators [i.e., the United States Attorney's Office for the Southern District of New York] was the source of the story." Id. at 599.

Of course, as the scandalous conduct of the Nadjari Office demonstrated, prosecutors, like persons in all other walks of life, are capable of serious misconduct in the performance of their duties. We have little doubt that, on occasion, leaks do emanate from prosecutors' offices. The Nadjari Office episode illustrates the dangers presented by ambitious, publicity-hungry prosecutors who, unable to obtain convictions or even indictments, seek to harm their targets and further their careers by a press campaign of unsupported grand jury leaks. See T. Goldstein, The News at Any Cost at 50 & 52 (1985).

As Mr. Nadjari's ultimate fate demonstrates, however, there are serious disincentives for prosecutors

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19. (footnote continued)

had recently ordered an internal investigation into the source of a news story concerning secret deliberations of another Southern District of New York jury. 432 F. Supp. at 599.

20. Indeed, we have seen that the "leaks" in that case probably originated with a Colorado police officer.

whose offices leak grand jury information. Most prosecutors in New York, even ambitious ones, consider their ultimate goal and vindication to be a properly-obtained conviction. These prosecutors have little to gain and the most to lose from grand jury leaks. While "prosecutors who leak can expect more flattering coverage than those who do not," T. Goldstein, The News at Any Cost at 50 (1984), any such publicity is generally matched by that attending the open announcement of an arrest, indictment or -- better yet -- conviction. Prosecutors may fear grand jury leaks, moreover, because they threaten the prospects for successful investigation and prosecution of suspects. Leaks give rise, for example, to the possibility of flight, witness and evidence tampering, the loss of cooperative witnesses, and needless pre- and post-indictment motion practice. Thus, it is often the case that "publication of grand jury matters works at direct cross-purposes with the Government's investigative efforts." (Letter of Rudolph W. Giuliani, United States Attorney, Southern District of New York, August 4, 1987).

VII. Recommendations

It is clear that leaks of grand jury information continue to be a matter of serious concern. We can take no satisfaction from the fact that these leaks may be no more

prevalent now than they were ten years ago or that these leaks emanate from investigators as well as prosecutors. Nevertheless, there is no evidence that grand jury leaks have, as some commentators claim, reached such unprecedented levels that draconian remedies, such as increased judicial intervention in the grand jury process or the widespread appointment of special prosecutors, are required.

The continued disclosure of secret grand jury information is nevertheless intolerable for at least two reasons. First, as the Justice Department noted in its 1981 ABSCAM Report, "unauthorized disclosures of investigative information may cruelly wound the truly innocent, damaging their reputations beyond hope of recovery." (ABSCAM Report at 1). Therefore, as the Nadjari Office episode demonstrates, the Bar must be vigilant against prosecutors or investigators who seek personal advancement at the cost of harming a target of a grand jury investigation.

Second -- and just as important -- is the need to maintain and promote public confidence in the integrity of the criminal justice system. Although we think it unjustified, there is a pervasive view in this City that grand jury leaks are indeed a mounting problem. The recommendations described below are intended to further these twin goals, while nevertheless leaving the grand jury and

prosecutors appropriate latitude in investigating and prosecuting criminal activity.

A. Independent and Vigorous Investigation

It is clear that allegations of grand jury leaks are not being investigated with the frequency or vigor necessary either to deter future violations or assure the public that authorities intend to protect the integrity of that institution. We therefore make the following recommendations:

First, for obvious reasons, investigations of prima facie cases of grand jury leaks should be conducted by entities independent of the prosecutor's office implicated in such disclosures.[21/]

In federal cases, it is appropriate, in our view, that the Justice Department's Office of Professional Responsibility ("OPR") undertake primary responsibility for any investigation of allegations of misconduct concerning

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21. We agree with the courts that have addressed this issue, that the appointment of a special prosecutor -- a remedy frequently sought by targets -- is in almost all cases inappropriate. E.g., In re Grand Jury Investigation (Esposito), supra, slip op. at 17. Special Prosecutors have proven to be an expensive remedy. Moreover, given their enormous power and virtual autonomy, special prosecutors should be used extremely sparingly. We hardly need point out that some of the most serious grand jury secrecy abuses in recent memory occurred in the Nadjari "Special Prosecutor's" Office.

Assistant United States Attorneys and investigators. 28 C.F.R. § 0.39a; USAM 1-4.200 (2/84). There is a general perception, however, that OPR only rarely investigates alleged Rule 6(e) violations and that even these investigations are not particularly vigorous.

We nevertheless believe that, as the Justice Department's 1980 investigation of the ABSCAM leaks proves, sustained and determined investigations can bring results. A number of the techniques used in that investigation are worthy of emulation. Obviously, sufficient investigative resources must be devoted to such an effort. In a sufficiently serious case, supervision of a particular investigation could be given to a prominent United States Attorney from another District. (ABSCAM Report at 2). Government officials with access to grand jury materials should be required to provide "signed, sworn statements describing the extent of their knowledge, the number and substance of their contacts with particular members of the press, and other pertinent details." (ABSCAM Report at 3). Finally, although this did not occur in the ABSCAM inquiry, it may be that reporters themselves could, under extreme circumstances, be required to disclose their sources. This will be discussed in greater detail below. (See pp. 79-82, infra).

State prosecutors in the City do not seem to be unanimous on the subject of who is responsible for investigations of grand jury leaks. The District Attorneys for Queens and New York counties appear to believe that their offices are empowered to investigate grand jury leaks in investigations being conducted by them. (Letters of James M. Kindler, Executive Assistant District Attorney, County of New York, June 10, 1987 and of Hon. John S. Santucci, District Attorney, County of Queens, June 19, 1987). The Brooklyn District Attorney, however, believes that:

> In New York City, allegations that a member of a District Attorney's Office has violated [the grand jury secrecy] statute may be referred to, and are within the exclusive jurisdiction of, the Office of the Special Prosecutor for Criminal Justice.

(Letter of William C. Donnino, Chief Assistant District Attorney, July 6, 1987) (emphasis supplied). The New York City Special Prosecutor has no views on the subject. (Letter of Dennis R. Hawkins, Special Assistant Attorney General, Office of the Special Prosecutor, June 17, 1987).

It seems clear, however, that, under Executive Orders issued pursuant to Section 63(2) of the Executive Law, as the Attorney General's appointee, the Special State Prosecutor for the New York City Criminal Justice System, does in fact have exclusive jurisdiction over such allegations. Exec. Order Nos. 55-59, N.Y. Admin. Code tit.

9, § 1.55-1-59 (1987); N.Y. Executive Law § 62(2). The reason, in part, for the confusion among prosecutive offices is that, as we were informed by the Special State Prosecutor, this "Office does not have publicly-available written policy and procedures for responding to reports of unauthorized disclosures of grand jury proceedings." (Letter of Dennis R. Hawkins, Special Assistant Attorney General, Office of the Special Prosecutor, June 17, 1987).

We recommend, therefore, that the Office of the Special Prosecutor formulate and promulgate to all District Attorneys Offices within its jurisdiction appropriate guidelines for the reporting of alleged improper grand jury disclosures. The Special State Prosecutor's responsibility for and interest in this area should be made known to the public.

Although some have questioned the Special Prosecutor's independence from other City prosecutors,[22/] this problem, if it in fact exists, should be addressed directly, rather than, as some have advocated, merely by

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22. During last year's Retreat, a Council on Criminal Justice workshop reported a consensus "by those [participants] conversant with the state system that the Special Prosecutor might be too close to the other prosecutors' offices to launch an investigation of such leaks." (Criminal Justice Council Report at 43).

consistent with maintaining the integrity of his investigation, announce an inquiry into the source of the alleged leak. The public should be assured that the investigation will be vigorous and that anyone found to have violated the law will be punished. The public should be informed in the event a prosecution or disciplinary action is found to be warranted;

3. While courts have, in appropriate instances, ordered the government to investigate prima facie cases of grand jury leaks, the results of those inquiries to our knowledge have rarely, if ever, been made public. See, e.g., In re Biaggi, supra, 478 F.2d at 490 n.1; In re Grand Jury Investigation (Esposito), supra, slip op. at 19-20; In re Archuleta, supra, 432 F. Supp. at 599. We believe that public confidence in the integrity of the grand jury requires that the government and courts announce both the pendency and any results of grand jury disclosure investigations. A commendable example of such a report occurred in the wake of the ABSCAM disclosures. (See ABSCAM Report). While we encourage the fullest possible disclosure, we recognize that, at times, the details of such investigations often must, for a period of time, remain confidential.

increasing the authority and/or involvement of the disciplinary committees.

B. Public Accountability

Too often, prosecutors react to grand jury leak allegations merely by drawing their wagons into a circle. We believe that prosecutors' offices must confront the erosion of public and judicial confidence in the principle of grand jury secrecy which, rightly or wrongly, inevitably accompanies a barrage of press disclosures such as we have experienced in the past two years.

Prosecutors' offices, therefore, should, consistent with the need to protect the rights of those under investigation and the integrity of the investigation itself, keep the public informed of efforts to investigate and punish those who improperly disclose grand jury secrets. To this end, we recommend the following measures:

1. Those offices that do not have written policies or procedures concerning the treatment of confidential grand jury material and investigations of alleged grand jury disclosure should adopt such guidelines and make them available to the public;

2. In the face of press reports of grand jury proceedings, the prosecutor responsible for the investigation in question should, on his own motion and as soon as is

C. Controlling Dissemination of Grand Jury Material

In order to control the dissemination of grand jury secrets, the following rules should be followed:

1. Every prosecutor and investigator who obtains access to grand jury information should be identified in a log of grand jury disclosures and each such individual should be required to sign a statement acknowledging his obligation to keep such material in the strictest confidence. We note in this regard that the federal practice of filing so-called Rule 6(e) letters with the Chief Judge of the District Court supervising a grand jury often does not identify all recipients of grand jury material. These letters generally do not identify supervisory personnel, both within a U.S. Attorneys' Office and at the agencies assigned to an investigation, who have been indirect recipients of grand jury information.

2. Persons in receipt of grand jury material should be obliged to record all contacts with the press.

D. Judicial Intervention

As we have seen, the Government's obligations in the face of an alleged Rule 6(e) violation are set forth in the Lance decision. Although a Fifth Circuit case, Lance draws on Second Circuit precedent and in any event, has found acceptance here. E.g., In re Grand Jury Investigation

(Esposito), supra, slip op. at 11-12. Application of the Lance criteria, however, while occasionally giving rise to an evidentiary hearing, has never, to our knowledge, resulted in the identification of the source of a Rule 6(e) violation. It seems appropriate, therefore, to reconsider whether the Lance standards are an adequate response to allegations of an illegal grand jury disclosure.

As we noted at the outset of this Report, Lance set forth a five-part test for movants seeking a full-fledged evidentiary hearing concerning alleged grand jury disclosures:

> (1) There must be a clear indication that media reports disclose "matters occurring before the grand jury";
>
> (2) The news reports must indicate that the source is one proscribed by Rule 6(e);
>
> (3) The "court must assume that all statements in the news reports are correct";
>
> (4) A person seeking relief under Rule 6(e) bears a "heavy burden" before a court will interfere with grand jury proceedings; and
>
> (5) The court must weigh any evidence presented by the government to rebut the assumed truthfulness of reports that otherwise make a prima facie case of misconduct.

In re Grand Jury Investigation (Lance), supra, 610 F.2d at 216-22.

Although the Lance criteria establish difficult hurdles for any victim of news reports, most observers recognize that these are necessary to prevent wholesale

judicial interference with the grand jury process every time a newspaper prints information that conceivably could have originated from the grand jury. See United States v. Eisenberg, supra, 711 F.2d at 964-65; In re Grand Jury Investigation (Lance), supra, 610 F.2d at 219; In re Grand Jury Investigation (Esposito), supra, slip op. at 17; In re Special April 1977 Grand Jury (Scott), 587 F.2d 889, 892 (7th Cir. 1978); In re Hunter, 520 F. Supp. 1020, 1022-23 (W.D. Mo. 1981), aff'd, 673 F.2d 211 (8th Cir. 1982). The reasons for this judicial self-restraint are not difficult to discern. Indeed, from the 1987 disclosures discussed above, it seems apparent that:

> (1) The press is often able to make deductions from the public record, grand jury subpoenas and witnesses and defense counsel concerning the scope and direction of a grand jury investigation;
>
> (2) The press often disguises non-governmental sources under intentionally ambiguous characterizations such as "sources close to the investigation";
>
> (3) Press disclosures are often incorrect in their description of purported grand jury proceedings;
>
> (4) Governmental disclosures, when they occur, frequently emanate from agencies not directly under prosecutors' control; and
>
> (5) In a society that gives preeminence to First Amendment concerns, press disclosures concerning grand jury proceedings are inevitable.

In light of these perceived realities, courts are properly unwilling either to bring grand jury proceedings to a halt in order to proceed with an often futile search for a culprit or to "punish" the Government by dismissing an otherwise valid indictment which, provided that grand jurors have not been infected by press reports, has obviated the very prejudice claimed by a defendant. See, e.g., United States v. Myers, supra, 510 F. Supp. at 328. We agree, therefore that, where the deliberations of grand jurors have not been infected by pre-indictment publicity, courts wherever possible should refrain from interfering with a pending investigation.

Consequently, we conclude that the Lance criteria, by and large, are appropriate guidelines for courts confronted with an alleged violation of grand jury secrecy. Within the framework of those guidelines, however, we believe that the courts should demand more of prosecutors confronted with such a claim:

First, in the face of substantial pre-indictment publicity, the Government as a matter of course must, and the court in its discretion should, question the Grand Jury concerning any effect that the press reports may have had on its deliberations. In particular, each grand juror should be polled to determine whether he or she has read or seen any

press reports concerning the investigation and, if so, whether these reports have affected his or her ability to impartially evaluate the evidence. See, e.g., In re Grand Jury Investigation (Esposito), supra, slip op. at 16. We note that prosecutors have on occasion conducted such a voir dire sua sponte. Nevertheless, it seems to us that it should be mandatory that a Grand Jury be polled whenever there is pre-indictment publicity about its investigation.

Second, we do not think it sufficient that, as has been the practice to date, the Government be able to rebut a prima facie case of a Rule 6(e) violation merely by means of a hearsay affidavit by one of the prosecutors involved in an investigation. Instead, where a newspaper article clearly attributes its source to government officials or investigators and the information accurately describes a grand jury proceeding, courts should demand that each prosecutor and investigator with access to or knowledge of grand jury matters submit a first person affidavit (1) denying any Rule 6(e), violation on his or her part; (2) denying knowledge of any such violation by anyone else; and (3) identifying by name each person to whom the affiant has, in the course of his or her duties, disclosed secret grand jury information. This procedure should ensure that, where a leak has emanated from a prosecutor, investigator or

grand juror, that individual will at least be placed under oath as admitting or denying such a disclosure.

This procedure should have some salutory effect both because it should bring home to the individual the seriousness of an individual's misconduct and provide some assurance to the public that prima facie cases of grand jury leaks are being taken seriously.[23/]

Third, in each case in which a movant has established a prima facie Rule 6(e) violation, the court should order a government investigation with periodic status reports to the court.

E. The Press Role

The problem of grand jury leaks presents, in stark form, the tension between the values of free speech and freedom of the press embodied in the First Amendment and the privacy and due process rights emanating from the Fourth and Fifth Amendments. Grand jury secrecy rules reflect a conclusion that the public and the press have no right to know what occurs in the grand jury room, unless the witness wishes to disclose his or her own testimony. The values

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23. Of course, a grand juror's and, on occasion, an investigator's affidavit will have to be filed under seal.

underlying that rule are deemed so important that it is enforced by criminal or quasi-criminal sanctions.

As a journalist has noted, moreover, reporters who knowingly solicit and/or transmit grand jury leaks, in effect have become "journalists for the prosecution" and thus vehicles for the abuse of governmental power:

> When prosecutors leak to journalists, journalists invariably get manipulated, and the target of the leak usually gets unfair treatment by being stigmatized in the press. Most of the time, reporters do not understand or try to discover the motive of a prosecutor, and it is rare that officials confer benefits on reporters without some selfish motive. Occasionally a prosecutor who is unable to secure an indictment under the rules of evidence seeks to harm his target by means of unfavorable publicity. He will leak derogatory information about such a target to reporters grateful to get exclusives and who then proceed to injure someone who, at least in the eyes of the law, is not culpable.

T. Goldstein, The News At Any Cost at 50 (1985). As a former Dean of the Columbia Graduate School of Journalism has written:

> "Many reporters have been slow to recognize that their common practice of granting anonymity to leakers puts them on slippery moral ground. They allow themselves to be used, many thoughtful reporters concede, for purposes they do not always comprehend."

E. Abel, Leaking: Who Does It? Who Benefits? At What Cost? 61 (1987). The most serious example of press participation in the abuse of prosecutorial power occurred when the press served as a mostly uncritical mouthpiece for Nadjari Office

accusations against persons who were never subsequently charged with any crime.

At the same time, one need only recall the "Pentagon Papers" case to recognize the potential for abuse in attempting to curb even arguably unlawful press disclosures through Government action. What seems called for, then, is at least a modicum of self-policing. Although there are (or so we are informed) at least nominal "Free Press/Fair Trial" standards in the media designed to protect the rights of indicted defendants, we are aware of no media standards to protect the reputations of grand jury targets who may never be prosecuted at all.

While we would not presume to specify particular pre-indictment standards for the press, we recommend that some standards be adopted, and that those standards reflect the following principles, among others:

1. Publication of the fact that an individual is the subject of a grand jury investigation could irreparably ruin the reputation of a person who may never even be charged with a crime;

2. By reporting on officials' leaks of grand jury information, the press is acting as a vehicle for the dangerous abuse of governmental power;

3. A reporter receiving grand jury information that has been improperly disclosed to him by a law enforcement official is a witness to the commission of a crime;

4. Although mere receipt of secret grand jury information from a law enforcement official is not

illegal, a reporter who offers or provides consideration for such a disclosure may himself be guilty of a crime;

5. A reporter should not be misleading when describing the quality of confidential sources. For example, information should not be attributed to government sources which in fact was obtained from grand jury witnesses or targets. Even when information is obtained from a government source, a reporter should be precluded from implying that this source is from a different government sector than is in fact the case. Thus, when a reporter's source is an investigator who is disclosing information obtained from a prosecutor, a reporter should not imply that his source was the prosecutor; and

6. Reporters should be conscious of the fact that, as commentators have noted, the public has "a right to know something about the possible prejudices of [a journalist's] sources." J. Powell, The Other Side of the Story 17 (1984). Accord E. Abel, supra, at 66; Thomas Griffith, "A Sinking Feeling About Leaks," Time, Dec. 22, 1980 at 81.

The above recommendation is directed toward self-policing by the press of its own potential involvement in the abuse of government power.

A different kind of problem arises when one looks at the press as a witness -- often the only witness -- to the commission of a serious crime by a public official. Balanced against the need for vital criminal evidence possessed exclusively by reporters is the fact that subpoenaing reporters in grand jury secrecy cases has a serious potential for chilling a vigorous press.

New York State and the Federal Government have resolved the broader "newsman's privilege" issue in different

ways. Under New York's so-called "Shield Law," N.Y. Civil Rights Law, § 79-h (McKinney's 1987), a reporter has an absolute privilege against revealing his source. This is true even if, as is true of state officials leaking grand jury secrets, the source's very act of divulging information is a crime. Sharon v. Time Inc., 599 F. Supp. 538, 582 (S.D.N.Y. 1982); Matter of Beach v. Shanley, 62 N.Y.2d 241, 252 (1984).

No such privilege exists, however, for a New York reporter subpoenaed to testify in a federal proceeding concerning Rule 6(e) violations.[24/] In Branzburg v. Hayes, 408 U.S. 665 (1972), the Supreme Court held that, in the absence of Congressional legislation, newsmen have no absolute right not to answer relevant and material questions asked during a criminal proceeding. Instead, a newsmen's claim of privilege

> should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.

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24. Federal courts are not bound by state shield laws. Von Bulow by Auersperg v. Von Bulow, 811 F.2d 136, 144 (2d Cir. 1987).

408 U.S. at 710.

The Second Circuit has implemented the Branzburg holding by adopting a standard of review that requires the party seeking a journalist's evidence to make a clear and specific showing that the information is "highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources." In re Petroleum Products Anti-trust Litigation, 680 F.2d 5, 7-8 (2d Cir.), cert. denied, 459 U.S. 909 (1982); see United States v. Burke, 700 F.2d 70, 76, (2d Cir. 1983).

Additional restrictions on the Government's ability to subpoena reporters are found in the United States Attorneys' Manual, § 1-5.271-.410, 28 C.F.R. § 50.10, which, in addition to requiring approval by the Attorney General of the United States, provides that:

> (a) In determining whether to request issuance of a subpoena to a member of a news media, the approach in every case must be to strike the proper balance between the public's interest in the free dissemination of information and the public's interest in effective law enforcement.
>
> (b) All reasonable attempts should be made to obtain information from alternative sources.
>
> (c) Negotiations with the media shall be pursued in all cases in which a subpoena to a member of a news media is contemplated.
>
> (d) In requesting the Attorney General's authorization for a subpoena to a member of the news media, in a criminal case, there should be reasonable grounds to believe, based on the

information obtained from the news media sources, that a crime has occurred, and that the information sought is essential to a successful investigation - particularly with reference to directly establishing guilt or innocence. The subpoena shall not be used to obtain peripheral, nonessential, or speculative information.

(e) The use of subpoenas to members of the news media should, except under exigent circumstances, be limited to the verification of published information and to such surrounding circumstances as relate to the accuracy of the published information.

Whatever our individual views about the wisdom in light of free press principles of Branzburg v. Hayes, we believe that, provided relevant standards are satisfied, federal courts, prosecutors or the victim of a Rule 6(e) violation may legally demand that a reporter reveal the name of the government official who disclosed secret grand jury information. It would trivialize the due process and privacy rights protected by grand jury secrecy to permit, as we now do, the subpoena of reporters in civil cases but preclude such subpoenas in cases where individual rights have been violated by the abuse of governmental power.

F. The Role of Professional Disciplinary Committees

Some have suggested that professional disciplinary committees should take an active role in investigating alleged grand jury secrecy violations. For example, a recent Criminal Justice Council workshop recommended that:

> departmental disciplinary committees of the Appellate Divisions should take a much more active role than they have been doing to date.
>
> . . . [T]here was a strong feeling that the mere knowledge on the part of a prosecutor that he can be called down to explain the actions of his office might have a very salutary effect within that office.

(Criminal Justice Council Report at 44).

While we would welcome greater involvement on the part of such organizations, it seems to us that it would be completely inappropriate to place principal reliance on disciplinary committees. First, although the Criminal Justice Council Report asserts that the practice of disciplinary committee investigations "could lead to more stringent regulation of the investigative agencies that work for the prosecutor" (id.), we fail to see how the conduct of New York City detectives or FBI, DEA, Secret Service, Customs, INA, IRS or Labor agents are going to be influenced in any way by lawyers' disciplinary committees. Second, we find it antithetical to our system of justice that essentially criminal investigations be conducted by what are, at best, quasi-judicial entities. Third, there could be constitutional problems with a state disciplinary rule purporting to regulate federal criminal investigations.

Therefore, while increased disciplinary committee involvement would be welcome, it would be folly to rely on

such arms of the Bar as a primary line of defense against grand jury leaks.

COMMITTEE ON CRIMINAL LAW

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* Chair of Subcommittee on Grand Jury Secrecy and principal author of this report.

** Member of Subcommittee

*** Mr. Young has chosen to disqualify himself from voting on this report.

[2/24/88]

SEPARATE STATEMENT OF LAWRENCE J. ZWEIFACH

The Committee has engaged in an important study of the problem of improper grand jury disclosures to the press. This study has included a survey of the policies and practices of state and federal prosecutors in New York City as well as an analysis of the relevant case law. After having carefully considered this potential threat to the integrity of our criminal justice system, the Committee found "that allegations of grand jury leaks are not being investigated with the frequency or vigor necessary either to deter future violations or assure the public that authorities intend to protect the integrity of that institution." Report at 65. The Committee also determined that "courts have not demanded from the government sufficiently vigorous investigation of alleged leaks." Report at 4.

On the basis of these apposite findings, the Committee has made a host of excellent proposals for tighter controls on the dissemination of grand jury materials, more independent investigation of grand jury leaks, more public disclosure of the details and the results of such investigations and greater judicial scrutiny of such investigations. Report at 63-76. I wholeheartedly endorse each of these proposals. I am impelled to express my views

separately, however, because I do not support the Report's analysis of "Recent Disclosures" or the findings of its inquiry into whether grand jury secrecy violations are a growing practice among prosecutors. Report at 27-63.

The Report's Recent Disclosures section discusses five recent cases in which defense counsel have claimed that the government improperly leaked grand jury information to the press. All but one of these cases are still pending before the United States Court of Appeals for the Second Circuit or the district courts. The alleged disclosures in one of these cases are presently under investigation by the United States Department of Justice's Office of Professional Responsibility and by the Office of Professional Responsibility of the Federal Bureau of Investigation. Moreover, for those cases that have yet to be tried, it appears that the alleged improper disclosures will remain under judicial scrutiny for a substantial period of time.

Although the Recent Disclosures section professes that it merely "briefly describe[s] the publicly-available information" in these five recent cases (Report at 27-28), in fact, it undertakes a far more ambitious task. Contrary to its unduly modest prefatory language, the Recent Disclosures section actually endeavors to analyze and express conclusions regarding the merits of alleged Rule 6(e) violations in these

pending cases. Indeed, the Report's analysis and evaluation of the alleged leaks in these recent cases is the principal basis for its finding that publicly-available information does not support public commentators' claims that (1) there has been an increase in grand jury leaks and (2) prosecutors are, in the main, the source of those leaks. Report 2.

As I read the Report, there is nothing in its own analysis of these cases that warrants such a finding. Moreover, notwithstanding the apparent limitations in the Report's methodology,[1/] the Recent Disclosures section is especially insidious because it could be construed as a finding by the Association of the Bar regarding the merits of extremely sensitive claims that are currently under investigation and judicial review. I believe that it is improper for a bar association to pass judgment on the merits of matters that are under investigation or before the courts. In the past, the Association of the Bar has

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1. The Recent Disclosures section discusses only publicly-available information and readily concedes that "more information may yet emerge" concerning the alleged improper disclosures. Report at 27. Furthermore, the Report as a whole does not purport to present an empirical study of the problem of grand jury leaks to the press. Instead, the Report merely discusses some of the more prominent, relatively recent cases in which claims of improper disclosures have been publicly filed.

studiously eschewed commenting on specific cases.[2/] In my view, there is no reason for this Report to depart from this well-founded tradition. Accordingly, I dissent from the Report's Recent Disclosures section.

I also do not support the Report's finding that publicly-available information does not demonstrate that there has been an increase in grand jury leaks or that prosecutors are, in the main, the source of those leaks. Report at 2. I cannot endorse this sweeping finding because, as indicated earlier, I see no reliable basis for it in the Report. Furthermore, I do not believe that this inquiry into whether leaking is a growing practice among prosecutors is necessary to justify the Report's recommendations. Notwithstanding its finding, the Committee nonetheless admits that it has "little doubt that, on occasion, leaks do emanate from prosecutor's offices." Report at 62. Also, the Committee recognizes that it "can take no satisfaction from the fact that these leaks may be no more prevalent now than

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2. For example, in former President Robert B. McKay's letter to the Editor of The New York Times, regarding the problem of pretrial and trial publicity by lawyers, he stated that "[i]t would not be appropriate for the Bar Associaton to comment publicly on a specific case." Former City Bar President McKay's Letter to the Editor of The New York Times, May 3, 1985, at A30, col. 3.

they were ten years ago or that these leaks emanate from investigators as well as prosecutors." Report at 63. Although I believe that it remains debatable whether leaking is a growing practice among prosecutors,[3/] it is not debatable that "there is a pervasive view in this City that grand jury leaks are indeed a mounting problem." Report 65. For this reason alone, the Committee's Report and recommendations are sorely needed.

Finally, I find "The Prosecutor/Investigator Distinction" section, as a whole, to be counter-productive. Report at 57-60. The Committee states that it recognizes that "police forces and other investigative agencies are generally not accountable to prosecutors." Report at 59. The Committee further comments that the "dissemination of confidential information through a number of prosecutive and investigative agencies, many of whom may not be accountable to the prosecutor in charge of a grand jury investigation, makes it difficult for that prosecutor to prevent leaks." Report at 58. This section of the Report concludes "that

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3. It is noteworthy that a workshop at the Sixth Annual Retreat of the Council on Criminal Justice recently reported "that there's been a real increase in leaks over the last few years in ongoing investigations -- names of people under investigation and what's going on in the grand jury." The Record of the Association of the Bar of the City of New York, Vol. 42, No. 5 at 668.

neither blame for, nor measures aimed against government leaks should be directed solely against prosecutors." Report at 59-60. While these separate pronouncements might on occasion prove to be true, I am fearful that the general thrust of this section will give the wrong message to prosecutors.

As legal counsel to the grand jury, prosecutors have a duty to ensure that the rules regarding grand jury secrecy are scrupulously obeyed both by the grand jury and its agents. Prosecutors are obligated to demand that agents assisting them in their investigations and who they designate as agents of the grand jury fully appreciate and abide by their duty to maintain grand jury secrecy. In the end, it is the prosecutor who is responsible for the conduct of a grand jury investigation. Therefore, it is ultimately the prosecutor's responsibility to prevent leaks and to require accountability on the part of the grand jury's agents.

In my view, the Report should forcefully remind prosecutors of their heavy burden to control the conduct of grand jury investigations. Instead, this section of the Report essentially provides prosecutors with an excuse, if not a license, to permit investigative agencies to remain unaccountable to them. Indeed, at times, the Report subtly shifts the responsibility for preventing leaks to

investigative agencies and even to the press. In sum, notwithstanding its numerous excellent proposals, the Report actually tends to acquit prosecutors of obligations which are ultimately theirs alone. This, I am afraid, will not prove to advance the goal of putting an end to the ongoing problem of grand jury leaks.

A REPLY TO RECOMMENDATIONS AFFECTING THE PRESS CONTAINED IN THE CRIMINAL LAW COMMITTEE'S REPORT ON GRAND JURY DISCLOSURES

By the Committee on Communications Law

Introduction

We take serious issue with the "press role" section of "Improper Grand Jury Disclosures to the Press" (the "Report") by the Association's Committee on Criminal Law (the "Committee"). We believe that the Committee's views are severely at odds both with First Amendment law and sound policy.

The Report, as we read it, concludes that: a) There is no support for the notion that there has been a new and unprecedented flood of unlawful grand jury "leaks" inasmuch as they have historically been associated with high-profile cases; b) prosecutors are unlikely to be responsible for leaks when they do occur; c) what appear to be leaks are probably merely "disclosures" by grand jury witnesses, targets, their attorneys or confidants; and d) while a "leak," on the one hand, and a witness or target "disclosure," on the other, might well contain identical information, the latter are not unlawful -- the Committee neither condemns nor discourages them. Having thus absolved prosecutors and defense counsel of responsibility for a problem it sees as more endemic than

emergent and more apparent than real,/1/ the Committee turns to the press.

First, the Committee calls upon the press to become, in effect, the keeper of government secrets; it lectures the media to adopt "standards" that would in fact militate against publication of most unauthorized disclosures -- whatever their value as news or as truth. Second, in the context of the Committee's recommendation of more frequent and vigorous enforcement of grand jury secrecy, it states that, if "relevant standards" are met, "prosecutors or the victim of a [grand jury secrecy] violation may legally demand that a reporter reveal the name" of his or her confidential government source. A refusal to do so by the reporter would presumably be met with sanctions for contempt.

The Committee's approach threatens to undermine the role of the press as reporter to the public of newsworthy information that it has gathered. It misconstrues the protection that must be and has been given to reporters' promises of confidentiality to sources, particularly when the sole "crime" involved is the giving of information to the reporter. The Report

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1/ Cf. Statement by Lawrence J. Zweifach, a member of the Committee on Criminal Law, adopted by the Committee on Criminal Advocacy.

reflects the inevitable myopia of non-journalists promulgating professional standards for journalists without first consulting the professionals whom they seek to regulate. We believe, therefore, that the Committee's reasoning and its conclusions are untenable.

Government Secrets and a Free Press: Tension Unresolved/2/

The Committee begins its treatment of the "press role" by noting "the tension between the values of free speech and freedom of the press embodied in the First Amendment and the privacy and due process rights emanating from the Fourth and Fifth Amendments." What the Committee fails to perceive, however, is that this tension, and more broadly the tension between efficient, effective government and a free press, is central to our political system. It defies the kind of resolution that the Committee recommends in the grand jury context.

2/ See generally A. Bickel, The Morality of Consent, 79-86 (1975) (hereinafter cited as "Bickel"). As he discloses, Professor Bickel was counsel for the unsuccessful amici in Branzburg v. Hayes, 408 U.S. 665 (1972). Although the book preceded most of the judicial development of the "reporter's privilege," and although we do not all subscribe to his views in their entirety, it remains, we believe, the starting point for any thoughtful consideration of the tension between government secrecy and press freedom.

The government's role is to govern: the military's to protect, the judiciary's to judge, the prosecutor's to prosecute, and the grand jury's to consider evidence and, where necessary, to indict. In the course of those activities, secrecy is sometimes appropriate. Whether or not appropriate, however, subject to certain First Amendment requirements, the government may opt to carry on its business in private. Grand jury proceedings are but one variety of government activity legally committed to confidentiality or, more precisely in the case of grand juries, to freedom from particular kinds of government disclosure./3/

The press acts as a counterbalance to this ability of government to govern behind closed doors. Acting as a surrogate for the public,/4/ the press seeks to ferret out facts. It does so by reviewing public

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3/ The Report does not evaluate the present contours of grand jury secrecy. This issue is presumably beyond the scope of the Report and therefore beyond the scope of this reply.

4/ Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573 (1980) (plurality opinion of Burger, C.J.) (instead of acquiring information first-hand, the public now acquires it chiefly through the print and electronic media); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491-92 (1975) ("in a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations.").

information, by asking questions and by listening to that which it is able to hear. Although the editorial decision whether to publish a particular story may be difficult, the basic function of the press is to tell its audience what it has learned and deems significant.

The system works imperfectly. Some matters that probably should be public are successfully shrouded by the government while some perhaps better maintained in confidence are made public by the press. But the system works, both to assure that information about government is available to the public and as a check on otherwise unbridled government power./5/

For this crucial mechanism -- "the adversary game between press and government"/6/ -- to operate, each side must play "by the rules." For the press, such rules probably include the requirement that it obey ordinary laws prohibiting it, like others, from larceny, blackmail, extortion and the like. They also arguably counsel against the press' dissemination of secrets simply and solely because it has obtained them. The rules have not, however, historically forced the press to choose between not publishing newsworthy material and publishing that

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5/ Cf. Or of the Press, Address by Justice Potter Stewart, excerpted in 26 Hastings L.J. 631, 634 (1975).

6/ Bickel at 80.

information under the threat that it will have to break its promise of confidentiality to sources or go to jail.

For the government, this adversary relationship requires its forbearance from using the government monopoly of force against the media to insure the integrity of government confidences. The "adversary game" disintegrates if the government's power to make and enforce laws is used to guarantee its victory in its fight to keep secrets./7/ If prosecutors or "victims" of published grand jury information may force reporters to reveal their confidential sources, as the Committee argues, some leaks may be prevented. But at what cost? The press' ability to obtain information -- even information legitimately given to the media by witnesses, targets or their counsel who ask assurance that their identities not be divulged -- would be seriously endangered./8/ The tension between the First Amendment

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7/ The parallel between the press/government adversarial relationship and the criminal prosecution/defense relationship is striking, inexact though such analogies tend to be. See Bickel at 81-82. Imagine a committee of the American Society of Newspaper Editors castigating the criminal defense bar for winning cases by exploiting law enforcement or prosecution errors, on the grounds that people "guilty of very serious crimes" were thereby being set free.

8/ Nothing in the Report suggests protection for reporters or their sources where, in fact, the grand jury information has come legitimately from a witness, target, or counsel, who nonetheless wishes to preserve his or her anonymity.

and the Fourth and Fifth would be resolved entirely at the expense of the ability of a free press to function fully and effectively.

The Constitutional Privilege Against Compelling Journalists to Identify Confidential Sources/9/

The Report claims that a reporter receiving improper grand jury leaks is a "witness -- often the only witness -- to the commission of a serious crime by a public official." Based on that observation, and after brief consideration of several cases, the Committee concludes that forcing reporters to identify confidential sources of grand jury information is permissible, at least in federal courts. In so doing, however, the Committee fails to address the principal distinction between the cases upon which the Committee relies and the situation that it is studying. We conclude, to the contrary, that the compelled disclosure of confidential sources, where the "crime" witnessed is merely the conveying of

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9/ The "reporter's privilege" is not limited to confidential sources. See e.g., United States v. Burke, 700 F.2d 70, 77 (2d Cir.), cert. denied, 464 U.S. 816 (1983); United States v. Cuthbertson, 630 F.2d 139, 147 (3d Cir. 1980), cert. denied, 449 U.S. 1126 (1981). In the context of grand jury information, however, the identity of the source may well be confidential, and the problem therefore seems to center on the press' ability to maintain that confidence.

information to a reporter, is forbidden by state statute and the Constitution.

The purpose of the "reporter's privilege" is to assure the free flow of information from sources to the public through the press. That assurance is possible only if the privilege in fact gives sources comfort that, when they receive a pledge of confidentiality from a reporter, the reporter will be able to honor that promise. Assurance that a journalist may be able to abide by a promise of confidentiality is not enough. A confidential source is likely to remain silent rather than face substantial risk of disclosure. It is therefore critical that, whether labeled "absolute" or "qualified," the privilege be dependable./10/

On the state level, the Report correctly notes that the New York shield law/11/ provides, with respect to

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10/ "Unless reporters and informers can predict with some certainty the likelihood that newsmen will be required to disclose news or information obtained in confidential relationships, there is a substantial possibility that many reporters and informers will be reluctant to engage in such relationships. As a result of this deterrence, the flow of information to the public will be diminished regardless of whether disclosure could have actually been compelled." Note, Reporters and Their Sources: The Constitutional Right to a Confidential Relationship, 80 Yale L.J. 317, 336 (1970). See also Zerilli v. Smith, 656 F.2d 705, 712-13 (D.C. Cir. 1981) (specifically in the context of civil litigation).

11/ N.Y. Civ. Rights Law § 79-h (McKinney 1988).

grand jury secrecy, an absolute privilege for a journalist to withhold the identity of a confidential source. The Court of Appeals has specifically addressed the question of the state's power to force a reporter to reveal how he or she learned about grand jury proceedings. In Matter of Beach v. Shanley,/12/ cited by the Committee, a television journalist learned of and then broadcast information contained in a secret grand jury report. A separate grand jury, empanelled to investigate the leak, issued a subpoena to the journalist. After an extensive review of the legislative history and underlying rationales for the shield law, the Court said:

> "The inescapable conclusion is that the Shield Law provides a broad protection to journalists without any qualifying language. It does not distinguish between criminal and civil matters, nor does it except situations where the reporter observes a criminal act . . . . Although this may thwart a grand jury investigation, the statute permits a reporter to retain his or her information, even when the act of divulging the information was itself criminal conduct."/13/

For New York, the "tension" between free speech rights and the enforcement powers of the state with respect to grand

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12/ 62 N.Y.2d 241, 476 N.Y.S.2d 765 (1984).

13/ Id., 62 N.Y.2d at 251-52, 476 N.Y.S.2d at 771.

jury material has thus left fully intact the reporter's ability to protect his or her sources./14/

The constitutionally based privilege that has been developed in federal criminal cases after Branzburg v. Hayes/15/ is "qualified." The primary qualification is that a journalist who is a witness to what Professor Bickel refers to as "a so-called natural crime"/16/ may be required to disclose the identity of a confidential source. Such disclosure cannot be required, however, until there has been a "specific showing that the

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14/ The Committee's treatment of the effect of the "shield" law on federal court proceedings in New York fuels our concern that the Report may be more an anti-press brief than a survey of the tension in this area. In footnote 24, the Committee states: "Federal courts are not bound by state shield laws. Von Bulow by Auersberg v. Von Bulow, 811 F.2d 136, 144 (2d Cir. 1987)." In fact, Von Bulow held that, although the New York "shield" law does not bind federal courts, it is persuasive authority on the subject: "In examining the boundaries of the journalist's privilege, we may consider also the applicable state law. . . . The underlying policies served by the New York Shield Law and federal law are congruent. Both 'reflect a paramount public interest in the maintenance of a vigorous, aggressive and independent press . . . see e.g., New York Times v. Sullivan, 376 U.S. 254 (parallel citations omitted) (1964),'" quoting Baker v. F & F Investment, 470 F.2d 778, 782 (2d Cir. 1972), cert. denied, 411 U.S. 966 (1973). The Von Bulow court proceeded, therefore, to explain why the state statute would not protect against forced disclosure under the highly unusual fact pattern before it. Cf. Riley v. City of Chester, 612 F.2d 708, 715 (3d. Cir. 1979).

15/ 408 U.S. 665 (1972).

16/ Bickel at 85.

[subpoenaed] information is: highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources."/17/

When dealing with journalists as witnesses to third-party crimes -- drug dealing, assassination, rioting/18/ -- the qualified privilege spelled out in the federal case law succeeds tolerably well. It does so because the situations where a reporter will (a) have information about a crime, (b) from a confidential source, (c) that is necessary for the prosecution or defense of the case and (d) that cannot be otherwise obtained "are bound to be infinitesimally few."/19/ It is precisely the rarity of such cases that renders the privilege dependable and therefore effective.

When the rule in Branzburg-type cases is taken out of context and applied to cases where the crime arises

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17/ In re Petroleum Antitrust Litigation, 680 F.2d 5, 7-8 (2d Cir.) (per curiam), cert. denied, 459 U.S. 909 (1982). The Second Circuit has held that the reporter's privilege, as so defined, extends similarly to both civil and criminal cases. United States v. Burke, 700 F.2d at 77. We are thus mystified by the Report's indication that subpoenas seeking confidential sources from reporters are allowed more readily in civil than in criminal cases thereby "trivializ[ing] the due process and privacy rights protected by grand jury secrecy . . ."

18/ Cf. Branzburg v. Hayes, 408 U.S. at 667-78.

19/ Bickel at 85.

out of the very relationship between source and reporter, the balance upon which the case law is based is destroyed. For this sort of "crime" the "witnesses" are almost always reporters because the nature of the offense is so closely related to reporters' First Amendment-protected function of gathering the news. Journalists may be the sole available witnesses because the informant, who is the only other witness to the disclosure, is likely to deny his or her role./20/ It is difficult to foretell whether, under the Committee's approach, reporters would in fact frequently be ordered to name anonymous informants./21/ But the mere possibility that forced disclosure of sources may become common threatens to destroy the willingness of sources -- even those who have a right to speak but prefer anonymity -- to rely on a

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20/ We do not believe that a government employee who leaks information will necessarily confess instead of signing an affidavit denying the allegation.

21/ The rigorous application of the requirement that alternate sources of information be exhausted before the press is subpoenaed may preclude a subpoena in most cases. In the grand jury context, every person who had or may have had access to information would have to give testimony and deny being the source before consideration could be given to asking the reporter to identify the source. This might well include not only every person present in the grand jury room, whether prosecutor, court officer, grand juror or witness, but also the witness' counsel and any individual with whom any of these people may have conferred.

journalist's promise of confidentiality. When sources cannot be assured of confidentiality, the "privilege" loses its value.

The danger posed by the Report, of course, extends far beyond the confines of grand jury secrecy. If the Committee's logic is accepted, then reporters may be required to identify confidential sources whenever their communication of information to the press has been prohibited.

"Enactment of a statute cannot defeat a constitutional" privilege to protect confidential news sources./22/ That would be bootstrap constitutionality. We seriously doubt that by classifying disclosure of corporate or police information to reporters as a crime, for example, a legislature could thus constitutionally wipe out confidentiality for journalists' corporate or law enforcement sources. Similarly, by deeming prosecutorial indiscretion contemptuous, Congress cannot, we think, obliterate constitutional protection for reporters' confidential informants on grand jury matters.

The existence of a "reporter's privilege" may from time to time hamper the effectiveness of the government's efforts to keep even secrets most would agree should be kept. But this is, we believe, a limitation

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22/ In re Petroleum Products Antitrust Litigation, 680 F.2d at 9.

that inheres in the constitutional balance between government power and the proper functioning of the press.

Professional Standards

The Committee recommends that ethical or professional "standards" governing publication of grand jury secrets be adopted by the media and that such standards reflect "principles" proposed by the Committee. We find the approach misguided.

We believe that, before making recommendations on matters largely outside its expertise, the Committee should have engaged in a searching review of the relevant facts and circumstances from the press' perspective. The Committee found a few journalists' quotations that it used to support its views. So far as we know, however, the Committee never engaged in any serious dialogue with journalists to determine either the facts or the journalists' views on the ethical issues involved. That alone casts serious doubt on the Committee's recommendations./23/

23/ As reflected above, we agree with the Committee that there are "tensions" in this area. We would have welcomed a Committee recommendation that they be debated, discussed and explored.

We, like the members of the Committee, are lawyers not journalists. Journalists are best equipped to respond to suggestions about journalists' ethics. But we find ourselves called upon to consider the principles enunciated by the Committee. We conclude that, at least when considered separately, they are largely unhelpful, misleading or irrelevant.

-- Identifying the subject of a grand jury investigation can harm a person's reputation./24/ The value of stating this self-evident proposition eludes us. Identification of a grand jury subject can injure him or her whether it results from a leak or a lawful disclosure. Publishing the name of the subject of a Congressional investigation or naming an indicted man or woman, whether eventually proven guilty or not, can similarly injure reputation -- as can the product of much

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24/ Recently, Drexel Burnham Lambert, Incorporated filed a prospectus with the Securities and Exchange Commission that included the following: "Drexel Burnham Lambert Incorporated has produced documents pursuant to subpoenas issued in connection with a grand jury investigation being conducted by the U.S. Attorney for the Southern District of New York and certain of its employees have appeared before such grand jury." Drexel Burnham Lambert Prospectus at 6 (Feb. 16, 1988). We find it noteworthy that the mere fact of investigation by a grand jury, the press publication of which the Committee implicitly condemns, is considered by Drexel and its lawyers to be of such importance to potential investors that it must be publicly disclosed.

other responsible journalism. The problem of injury to reputation is inherent in the decision whether to publish accounts of events. Addressing the issue solely in the context of government disclosure of grand jury secrets, however, is unhelpful. Indeed, it is misleading to suggest that injury to reputation is a unique problem where publication of supposedly confidential grand jury material is concerned.

-- The press acts as a "vehicle for the dangerous abuse of governmental power." Grand jury leaks are not different in this regard from any other unauthorized government disclosure. Possible manipulation of the press is part of press coverage of the government. The evaluation of possible bias on the part of sources is, like reputational injury, already a matter of daily professional concern to the working press. There is nothing different about the problem of grand jury leaks in this regard.

-- A reporter who receives a grand jury leak witnesses the commission of a crime. This observation applies to any reporter who obtains unlawfully disclosed information, whether it is eventually published or not. Yet again, the Committee raises a problem that is not peculiar to grand jury information and offers no insight on the specific implications of its extremely general observation.

-- It is a crime to offer or provide consideration for illegally disclosed information. Inasmuch as no information in the Report even remotely suggests that reporters do pay for grand jury leaks, we do not understand the relevance of what may or may not be an accurate statement of the law.

-- Reporters should not misidentify sources of information about matters occurring before a grand jury. As a general matter, we would suppose, reporters should not purposely misidentify anybody or anything, including sources of grand jury information./25/ This "principle" adds little to the cliche that "honesty is the best policy."/26/

25/ There is nothing in the Report to indicate that there is a widespread practice by the press of misidentifying sources of grand jury material. We are in no position, however, to exclude the possibility that some degree of obfuscation might be warranted where, for example, it is thought necessary to preserve a source's anonymity.

26/ The Committee distinguishes between illegal (or contemptuous) prosecution "leaks" and legal defense disclosures and says that, consequently, "information should not be attributed to government sources which in fact was obtained from grand jury witnesses or targets." The Committee does not take into account in its Report, however, the fact that, because virtually all grand jury material is available from non-leaking sources, information about ongoing grand jury investigations is often widely known in the community, irrespective of leaks or media publication.

-- The public has "a right to know" about possible source prejudices. If the Committee means it is wise for the media to identify source prejudices in published news items, we believe this is probably an over-generalization. While identification of source prejudices may be desirable in many circumstances, we believe a variety of factors may be taken into account, including the nature of the leak and the possibility that identifying a bias will tend to identify a confidential source. This is, we think, a classic example of what editors, not lawyers, are supposed to decide, on a case-by-case basis. Editorial decisions do not yield to the mechanical application of wooden "principles."

We thus might be inclined to dismiss the Committee's suggested principles as truisms or trivia, were we not concerned that the Committee's message, taken as a whole, runs deeper. Read together, the Committee's "principles" do not counsel about publication of grand jury information, they counsel against it./27/ The

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27/ The Committee is apparently not against all publication of government secrets. It makes a passing reference to the "Pentagon Papers" case, "recogniz[ing] the potential for abuse in attempting to curb even arguably unlawful press disclosures through Government action." The Report does not, however, explain why the Committee would favor, if it would, publication of the "Pentagon Papers" but not of grand jury matters disclosed by the government. Neither does the Committee inform us what principled distinction it intends to make between them.

message to the press seems not to be, "Consider the dangers to others when you publish leaked information." Instead, when combined with the remainder of the "press role" section, the message apparently is, "Consider the danger to yourselves." The Report clearly implies a threat: If a journalist persists in publishing grand jury secrets, compelled disclosure of his or her confidential sources, or the sanctions of contempt, are likely to follow.

The Committee ignores the fact that information may have an intrinsic value irrespective of its source and that the primary function of the press is to disseminate information. A reporter who knows what is in the "Pentagon Papers," or that a candidate for Mayor of New York City has repeatedly invoked his privilege against self-incrimination,/28/ for example, is impelled by the nature of his job to share that news with the public. The information is no less important, and it is no less the function of a reporter to report it, simply because a law says that the reporter was not supposed to know it in the first place.

We believe the notion that the press has a professional obligation to guard the government's secrets,

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28/ Report, Section IV A, "The 1973 Biaggi Disclosures."

grand jury or otherwise, by generally refusing to publish them, is flatly wrong. "[T]he presumptive duty of the press is to publish, not to guard security or to be concerned with the morals of its sources."/29/ As Elie Abel concludes in his monograph from which the Committee quotes:

> "Any critical examination of the surreptitious traffic in leaks risks losing sight of the truth . . . that 'our particular form of government won't work without it.'"/30/

Conclusion

Almost all of the "reporter's privilege" cases arise in the context of subpoenas to the press from civil litigants or criminal defendants. There are no New York state or federal cases that the Committee cites or of which we are aware in which prosecutors have forcibly obtained the identity of confidential sources. The Committee fails to ask why such cases do not arise.

The leaking of government secrets is not new nor is it confined to what takes place before a grand jury. It has resulted in a great deal of highly publicized

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29/ Bickel at 81.

30/ E. Abel, Leaking: Who Does It? Who Benefits? At What Cost? 68 (1987) quoting Bruce Catton, as cited in Cater, The Fourth Branch of Government 137 (1959).

governmental hand-wringing,/31/ yet federal prosecutors, at least, have apparently declined to attempt to stop the practice by subpoenaing the press in the manner suggested by the Committee. They have as yet failed generally to employ the Committee's observation that a journalist receiving grand jury secrets may be the only available witness to a crime, arguably giving rise to an exception to the constitutional privilege.

Perhaps that idea has not occurred to federal prosecutors; we doubt it. Perhaps that approach is not considered politically wise or expedient; it may not be. But perhaps the reluctance of federal prosecutors to subpoena reporters to find their sources represents at least in part an understanding that the government must keep its own secrets; that a free press cannot be impressed into that service and remain free. We are convinced that that understanding is profoundly right; it should continue to counsel prosecutors, defense lawyers, and the courts to resist the Committee's dangerous invitation.

31/ See e.g., Cannon, Plan to Fight Official Leaks Put "On Hold", Washington Post, May 30, 1986, at A1 (describing the debate on a proposed plan for "sterner measures against employees who leak classified information, [including] increased use of polygraphs and the creation of [a] special FBI group"); Pincus, Pentagon to Probe Staff for Leak, Washington Post, November 19, 1985, at A22 (describing President Reagan's anger and the subsequent Pentagon investigation of a pre-summit leak of a letter written by Defense Secretary Weinberger).

The "press role" section of the Report will be perceived, rightly we fear, as a condemnation of the publication of grand jury secrets by the press and as a call for requiring reporters, on pain of contempt, to identify confidential sources. As such, we submit, it does a serious disservice to the press and to First Amendment principles.

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February 29, 1988

NY: 2137P

STATEMENT OF THE
COMMITTEE ON FEDERAL COURTS
OF THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK

The Federal Courts Committee unanimously joins in the Separate Statement of Lawrence J. Zweifach, Esq. to the Report of the Criminal Law Committee on Improper Grand Jury Disclosure to the Press (the "Report") and in the Reply of the Committee on Communications Law.

We agree with Mr. Zweifach that the Report errs in purporting to determine whether grand jury leaks are more common today than in the past. The Committee's conclusions are based on an inadequate study of the problem by the Criminal Law Committee, a study which appears to have been based almost entirely on statements by prosecutors in the metropolitan area without satisfactory input from defense counsel. The Report compounds the error by focusing on a few newsworthy cases, while omitting discussion of many others where there have been allegations of grand jury leaks. The issue of improper disclosures is also sub judice in certain of the very cases relied on in the Report. We question whether the Bar Association should issue a report which attempts to deal with cases actually pending in court.

Moreover, we believe that much of the Report focuses on the wrong question by asking whether there has

been an increase in grand jury leaks by prosecutors, and whether leaks originate from prosecutors or investigators. The question should not be whether to exonerate or blame prosecutors for a situation which a Committee lacks the ability to investigate and determine. Rather, as the Report eventually does, we believe a Committee report should make constructive recommendations to deal with the admitted public perception of serious improper grand jury disclosures. As Mr. Zweifach points out: "[t]he Report actually tends to acquit prosecutors of obligations which are ultimately theirs alone. This . . . will not prove to advance the goal of putting an end to the ongoing problem of grand jury leaks."

We also believe that the Committee on Communications Law is correct in objecting to the Report's treatment of the press because any required self-policing may well violate the First Amendment. The Report unfortunately can be read to encourage subpoenas of the press--a position which is simply contrary to Federal law and to current Department of Justice policy, and is flatly barred by New York State law under these circumstances. It is ironic that, having acquitted prosecutors and having determined that the problem is not growing, the Report is nevertheless prepared to encourage radical action against

the press. We cannot agree with those proposals relating to the press.

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March 2, 1988